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COPYRIGHT LAW REVISION.

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Mr. KASTENMEIER, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 2512]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2512) for the general revision of the copyright laws, title 17 of the United States Code, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE

The purpose of H.R. 2512 is to enact a general revision of the U.S. copyright law, constituting title 17 of the United States Code, in light of the profound technological and commercial changes that have taken place since the 1909 revision. The present bill is an outgrowth of H.R. 4347 which was introduced on February 4, 1965, in the 89th Congress. After extensive hearings and thorough deliberations on H.R. 4347 by Subcommittee No. 3, the committee reported favorably an amended version of H.R. 4347 (H. Rept. No. 2237, 89th Cong., second sess., Oct. 12, 1966). The present bill is substantially identical with H.R. 4347 as so amended and reported by the committee. The changes proposed by the committee from H.R. 4347 as introduced, reflected consideration of a number of the issues as they became clarified by the hearings and subsequent discussions. The purpose of these proposed changes is indicated below in the sections of this report captioned "Summary of Principal Provisions" and "Sectional Analysis and Discussion." A comparative print showing (1) the reported bill, (2) existing law, and (3) the provisions of H.R. 4347, 89th Congress *as introduced* will be found in the section captioned "Changes in Existing Law."

BACKGROUND

The first copyright law of the United States was enacted by the First Congress in 1790, in exercise of the constitutional power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" (U.S. Constitution, Art. I, sec. 8). Comprehensive revisions were enacted, at intervals of about 40 years, in 1831, 1870, and 1909. The present copyright law, title 17 of the United States Code, is basically the same as the act of 1909.

Since that time significant changes in technology have affected the operation of the copyright law. Motion pictures and sound recordings had just made their appearance in 1909, and radio and television were still in the early stages of their development. During the past half century a wide range of new techniques for communicating printed matter, visual images, and recorded sounds have come into use, and the increasing use of information storage and retrieval devices, communications satellites, and lasers promises even greater changes in the near future. These technical advances have generated new industries and new methods for the reproduction and dissemination of copyrighted works, and the business relations between authors and users have evolved new patterns.

Between 1924 and 1940 a number of copyright law revision measures were introduced. All these failed of enactment, partly because of controversy among private interests over differences between the Berne Convention and the U.S. law. After World War II, the United States participated in the development of the new Universal Copyright Convention, becoming a party in 1955.

In that year, the movement for general revision of the U.S. copyright law was revived and the legislative appropriations act for the next 3 years provided funds for a comprehensive program of research and studies by the Copyright Office as the groundwork for such revision. There followed a period of study culminating in 1961 in the "Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law." Subsequently numerous meetings and discussions were held by the Register and his staff with a panel of consultants drawn from the copyright bar. As a result, on July 20, 1964, Chairman Celler introduced, at the request of the Register, H.R. 11947. The 88th Congress adjourned before detailed consideration could be given this measure.

H.R. 4347, introduced on February 4, 1965, marks a partial revision of the 1964 bill. It was referred to Subcommittee No. 3, which held hearings on the measure on 22 days; namely, May 26, 27, and 28, June 2, 3, 4, 9, 10, 16, 17, 23, 24, and 30, August 4, 5, 11, 12, 18, 19, and 26, and September 1 and 2, 1965. More than 150 witnesses were heard. After the close of the hearings during 1966, the subcommittee devoted 51 executive sessions of approximately 2 hours each to its study of the legislation, during which it reviewed each of the hundreds of separate points raised by the witnesses and the arguments for and against them.

In the present Congress, the reconstituted subcommittee devoted three additional executive sessions to a review of the measure and voted to recommend favorable report of H.R. 2512 without amendment.

Although they have differed on various issues, the interests affected by copyright law revision are in general agreement as to the inadequacy of the present law. The dual purposes of copyright protection, to stimulate authors to create and to reward them for their efforts, are of fundamental importance, and these purposes are ill-served by the 1909 statute. There is an urgent need for copyright legislation that takes full account of the continuing technological revolution in communications and, even more important, that recognizes individual authorship as an indispensable national resource. The bill now reported reflects the intricate network of relationships among the many groups and industries dependent for their existence upon works created by authors, and represents an effort to reconcile conflicting interests as fairly and constructively as possible. Despite the complexity and particularization of some of its provisions, however, the basic aim of the bill is very simple: to insure that authors receive the encouragement they need to create and the remuneration they fairly deserve for their creations.

SUMMARY OF PRINCIPAL PROVISIONS

CHAPTER 1. SUBJECT MATTER AND SCOPE OF COPYRIGHT

Section 101. Definitions

The significant definitions in section 101 will be mentioned or summarized in connection with the provisions to which they are most relevant.

Section 102. Subject matter in general

Requirements of copyrightability.—The basic subject matter of copyright is specified as “original works of authorship” that have been “fixed” in a “tangible medium of expression.” Under the definition in section 101, a work is “fixed” if its embodiment in a physical object is “permanent or stable” rather than “transitory,” but the form of fixation is immaterial as long as the work is capable of being perceived directly or made perceptible through any existing or future machine or device.

Categories of copyrightable works.—Section 102 specifies seven categories of copyrightable works, but the list is “illustrative and not limitative.” The enumeration includes all classes of works that are copyrightable under existing law and adds a new category of “sound recordings.” “Pantomimes and choreographic works” are linked together as a new category; “motion pictures and other audiovisual works” are specifically designated as a separate category.

Section 103. Compilations and derivative works

Section 103 makes clear that compilations and derivative works, which are works employing preexisting material or data, are fully subject to the basic standards of copyrightability, and defines the

interrelationship between protection of preexisting and of "new" material in a particular work.

Section 104. National origin

Copyright protection for unpublished works would be granted by section 104, as is now the case under the common law, without regard to the author's domicile or nationality. Like the present statute, the bill would protect published works of foreign origin only if the country of origin were covered by a treaty or a Presidential proclamation; the President would be authorized to issue a proclamation if he finds that the country it covers extends protection to U.S. works and to its own works "on substantially the same basis."

Section 105. U.S. Government works

The present prohibition against copyright in Government publications is retained and expanded to cover any published or unpublished work of the United States Government"; the term is defined as "a work prepared by an officer or employee of the United States Government as part of his official duties." The provision would not prohibit copyright from being secured in works prepared independently under a Government contract or grant, but without exception would forbid copyright in any "work of the United States Government."

Section 106. General scope of exclusive rights

Under the general approach of the bill, section 106 sets out the exclusive rights of the copyright owner in broad terms, and sections 107 through 116 specify various limitations and qualifications applicable to particular situations and particular kinds of works. The five basic rights made exclusive under a copyright are: (1) The right to reproduce the work in copies or phonorecords; (2) the right to prepare derivative works based on the copyrighted work; (3) the right to distribute copies or phonorecords of the work to the public; (4) the right to perform the work publicly; and (5) the right to display the work publicly. The concept of "public" performance or display is defined to include activities at places open to the public and where "a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." The concept also includes transmissions of performances and displays to members of the public.

Section 107. Fair use

Section 107 recognizes the present judicial doctrine of fair use and restates it in a way that offers guidance to users in determining when the principles of the doctrine apply, but without changing its scope. (See also sec. 504(c) (2) regarding innocent teachers as to what constitutes a fair use.)

Section 108. Reproduction of works in archival collections

Nonprofit institutions having archival custody over manuscripts or similar collections of unpublished works of scholarly value are given the privilege of making facsimile reproductions of works in their collections, as long as the reproduction is not done for profit and is "for purposes of preservation and security, or for deposit for research use" in another institution of the same type.

Section 109. Effect of transfer of particular copy or phonorecord

Section 109 restates and confirms the principle that, where the copyright owner has transferred ownership of a particular copy or phonorecord of his work, the person who becomes the owner is entitled to dispose of the copy or phonorecord by sale, rental, or any other means. This principle does not apply where a person has acquired possession under a rental or loan arrangement, without obtaining ownership of the object. Under section 109(b), the owner of a copy would be able to display it publicly "to viewers present at the place where the copy is located," as long as he does not project more than one image at a time or transmit images by television or similar devices.

Section 110. Exemption of certain performances and displays

Face-to-face teaching activities.—Clause (1) of section 110 extends to all types of works, and exempts from copyright control their performance or display by "instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution," where the activities take place "in a classroom or similar place devoted to instruction." A special exception to this privilege is made for motion pictures or other audiovisual works in certain cases where the copy used for the performance was not lawfully made.

Instructional broadcasting.—Under the limited conditions specified in section 110(2), certain instructional transmissions would be exempted from copyright liability. The exemption would apply only to transmissions made "by a governmental body or other nonprofit organization," and would cover displays of any type of work and performances of nondramatic literary or musical works (not including motion pictures and other audiovisual works). The performance or display must be "a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution." The transmission must not cover a radius of more than 100 miles, thus excluding from the exemption simultaneous satellite or nationwide network transmissions, and its time and content must be controlled by the transmitting organization, thus excluding transmissions of instructional material to individual users by means of computers and the like. The transmission must be intended primarily for reception: (1) in classrooms or similar places; or (2) by "persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms"; or (3) by "officers or employees of governmental bodies as a part of their official duties or employment."

Religious services.—The exemption in clause (3) of section 110 covers performance of a nondramatic literary or musical work "or of a dramatico-musical work of a religious nature," and displays of works of all kinds, "in the course of services at a place of worship or other religious assembly."

Certain other nonprofit performances.—Section 110(4) exempts the performance of a nondramatic literary or musical work, "otherwise than in a transmission to the public," where there is no profit motive and no "payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers," if either of

two conditions is met: (1) no direct or indirect admission charge is made, or (2) the net proceeds are "used exclusively for educational, religious, or charitable purposes and not for private financial gain." In the second situation, however, the copyright owner would be entitled to forbid fund-raising performances for purposes to which he objects by giving notice at least 7 days before the performance.

Mere reception in public.—Under section 110(5) there would be no copyright liability for merely turning on an ordinary radio or television receiver in a public place.

Section 111. Secondary transmissions, including community antenna television

General purpose of the section.—Section 111 sets out various limitations on the exclusive rights of the copyright owner with respect to secondary transmissions of his works to the public. Secondary transmissions covered by the section include the operations of community antenna systems, nonprofit boosters and translators, passive common carriers, and relays to hotel rooms and the like.

General exemptions.—The following secondary transmissions are exempted from copyright liability under section 111(a): (1) mere relays to the private rooms of hotels and the like, unless there is a direct charge for the retransmission; (2) secondary transmissions of instructional broadcasts exempted under section 110(2); (3) secondary transmissions by common carriers who have no control over program content or selection of the recipients of the secondary transmission, and who merely provide communications channels for the use of others.

Nonprofit secondary transmissions.—Wholly noncommercial secondary transmissions by governmental bodies or other nonprofit organizations (boosters, translators, cooperatives, etc.) would be exempt unless the secondary transmitter also engages in one of the activities covered by section 111(b).

Exemption of secondary transmissions solely within primary transmitter's normal area.—Where a secondary transmitter does not operate beyond the area normally encompassed by the primary transmitter, he is exempt from copyright liability unless he engages in one of the activities covered by subsections (b) or (c) of section 111.

Secondary transmissions fully actionable.—Except for the relays to hotel rooms, instructional retransmissions, and passive common carrier activities covered by subsection (a), a secondary transmitter is fully liable if he does any of the following: (1) alters program content; (2) originates programs (with some limited exceptions); (3) charges for particular transmissions; (4) picks up primary transmissions not intended for reception by the public at large; (5) operates outside the primary transmitter's normal area and has not recorded his identity in the Copyright Office; (6) operates outside the primary transmitter's normal area and within an area adequately served by other primary transmitters; or (7) operates in any area normally encompassed by one or more transmitting facilities other than the primary transmitter, if he has received notice that one of them has already acquired the exclusive right to transmit the copyrighted work in that area.

Limited liability for certain secondary transmissions.—Unless section 111(b) is applicable, liability for certain secondary transmissions would be limited to recovery of a reasonable license fee; this would generally be true where the secondary transmitter is not operating in an adequately served area and has not received notice of an exclusive license. Where the court finds the infringer failed to accept a reasonable offer, recovery of a reasonable license fee may be increased up to 3 times (and in no case to less than \$250); and where it finds that the copyright owner failed to accept a reasonable offer, it may withhold monetary recovery and award costs and attorney's fees to the infringer.

Section 112. Ephemeral recordings

Section 112 of the bill, unlike the present law, recognizes the right of a transmitting organization to make "ephemeral recordings" of works (other than motion pictures and other audiovisual works) that it is entitled to transmit to the public. Under subsection (a), an organization that has acquired the right to transmit the work (or that is free to transmit it under section 114) may make a single copy or phonorecord of a particular program embodying a performance or display of the work if it is used solely for the organization's own transmissions within its own area and after 6 months is destroyed or preserved solely for archival purposes. Section 112(b) deals with the special situation of nonprofit organizations that are free to transmit a work under the instructional broadcasting exemption of section 110(2); it would allow reproductions of two copies or phonorecords under certain conditions and would extend the period of use to 1 year. A work that came into being as the result of an ephemeral recording could not be copyrighted without the consent of the owners of copyright in the preexisting works employed in it.

Section 113. Reproduction of pictorial, graphic, or sculptural works in useful articles

Section 113 is intended to make clear that nothing in the bill changes the present law, as expressed in the court decisions, concerning: (1) the copyright status of a work that is employed as the design of a useful article, or (2) the rights of a copyright owner in a pictorial, graphic, or sculptural work "that portrays a useful article as such" with respect to "the making, distribution, or display of the useful article so portrayed."

Section 114. Sound recordings

Under the bill, as provided by section 106 and in more detail by section 114, sound recordings would be recognized as copyrightable works in themselves, and would be protected against unauthorized duplication and the distribution of phonorecords duplicated without authority. However, the owner of copyright in a sound recording would not be given an exclusive right of public performance, nor would he have rights against someone who merely imitates his recording without capturing the same sounds.

Section 115. Compulsory license for phonorecords

The essential features of the present compulsory license for the making and distribution of phonorecords of copyrighted musical works have been retained in section 115, but with a number of modifications and clarifications. The present statutory royalty for each composi-

tion recorded under a compulsory license would be raised to a rate of 2½ cents per phonorecord, or one-half cent per minute of playing time on each phonorecord, whichever is larger. The bill also provides that the failure to obtain either a compulsory or a negotiated license, or a default in payment under a compulsory license, would make the user fully liable as an infringer.

Section 116. Performances on coin-operated phonorecord players

Instead of the outright exemption of the present law and the proposals to impose full liability on "jukebox" performances considered earlier, the bill in section 116 adopts a system of compulsory licensing for public performances by means of coin-operated phonorecord players. In general, a jukebox operator who has not negotiated licenses with the owners of copyright (or their agents) in the compositions publicly performed on his machines could obtain a compulsory license by: (1) recording the phonorecord player in the Copyright Office at specified intervals; (2) posting a certificate of the recordation on the box; (3) filing a statement in the Copyright Office listing the songs performed during the preceding year that were not covered by a negotiated license; and (4) making quarterly statements of account and royalty payments to copyright owners who are identified on phonorecords performed without a negotiated license. Special provisions are made to require a copyright owner to claim payment when he was not identified on the phonorecords used, and there are also provisions making noncomplying operators fully liable for copyright infringement. The royalty rate established by section 116(c) (2) is payable for each quarter during any part of which the song is available in the phonorecord player, and is either (1) 3 cents, or (2) a prorated amount of less than 3 cents, based on box capacity and the total number of songs available for performance during the quarter.

CHAPTER 2. OWNERSHIP AND TRANSFER OF COPYRIGHT

Section 201. Copyright ownership

Initial ownership.—Section 201(a) restates the established principles that copyright ownership originates in the author, and that the authors of a "joint work" are coowners of the copyright. Under section 101 a "joint work" is defined as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."

Works made for hire.—Subsection (b) retains the present principle governing works made for hire: that in such cases "the employer or other person for whom the work was prepared is considered the author." A "work made for hire" is defined in section 101 to include not only "a work prepared by an employee within the scope of his employment," but also a group of special types of works that have been "specially ordered or commissioned" for certain specified purposes, if there has been an express agreement to consider the work as one "made for hire."

Contributions to collective works.—Section 201(c) states explicitly that each individual contribution to a collective work, such as an encyclopedia article or a story first published in a magazine, is considered a separate work in which copyright ownership "vests initially

in the author." Subsection (c) also establishes a presumption that, in the absence of an express transfer, the author retains ownership of copyright in his contribution and the publisher acquires only certain publishing rights.

Transfer and divisibility of copyright.—Copyright ownership is transferable under the bill, as under the present statute, by any means of conveyance or by operation of law. Clause (2) of section 201(d) is intended to solve the problems that have arisen under existing law because of the theory that copyright is indivisible; it provides that "any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred * * * and owned separately."

Section 202. Distinction between ownership of copyrights and material object

Section 202 makes clear a principle also stated in the present law: that ownership of a copyright, and ownership of a material object embodying a copyrighted work, are separate and independent, and that transfer of one does not necessarily mean transfer of the other. The bill would reverse a presumption, held to exist under common law, that an author or artist transfers his literary property rights when he transfers ownership of his manuscript or work of art without reserving them.

Section 203. Termination of transfers and licenses

For works copyrighted after the effective date, the bill drops the renewal provision of the present statute under which, in certain circumstances, copyright ownership reverts to the author or other specified beneficiaries at the end of 28 years. Instead, section 203 permits the termination of any grant made by an author, or by two or more authors of a joint work, after 35 years (or 40 years in some cases). Termination of a grant can be effected by majority action of the authors who signed it or of their interests; if an author is dead his right to terminate can be exercised by the action of a specified majority of his widow and children or grandchildren. Termination would require the serving of an advance notice on the grantee within specified time limits. Grantees would be given the equivalent of a right of "first refusal," and any grantee who has made a derivative work under his grant could continue to use it even after termination.

Sections 204 and 205. Execution and recordation of transfers

The bill would clarify and tighten the provisions of the present law dealing with the execution and recordation of transfers of copyright ownership. Registration and proper identification of the copyrighted work it covers would be conditions for according a recorded document constructive notice.

CHAPTER 3. FEDERAL PREEMPTION AND DURATION OF COPYRIGHT

Section 301. Single Federal system

The present dual system of protection of works under State common law (or statute) before they are published, and under Federal statute after publication, is replaced by a single system of Federal statutory protection for all published and unpublished works. Com-

mon law protection would continue for works that are not fixed in any tangible form, but as soon as fixation takes place they are subject to exclusive Federal protection under the bill even though they are never published or registered. Under the definition of "fixed" in section 101, a copyrightable work that is being transmitted and fixed simultaneously is considered "fixed" at the moment of its transmission.

Section 302. Duration of copyright in works created under new law

The new law would change the present term of copyright (28 years from publication or registration, plus a renewal of 28 years) and, for works created after it comes into effect, would provide a basic term of the life of the author and 50 years after his death. As in most countries, "joint works" would be protected for 50 years from the death of the last surviving author. A term of 75 years from publication, with a maximum limit of 100 years from creation, would generally be provided for anonymous works, pseudonymous works, and works made for hire. Under section 302 the Copyright Office would maintain records of information concerning the dates when authors died, and a system of presumptions is established to cover situations where a user cannot determine the date of a particular author's death.

Section 303. Duration of copyright in preexisting works under common law protection

Unpublished works under common law protection when the new law becomes effective would be brought under statutory protection and given the applicable statutory term. To insure that a reasonable period of protection is given to all these works, and to induce their publication, the bill provides that in no case will their term expire before 1993, and that, if published before then, the term in these works will extend at least to 2018.

Section 304. Subsisting copyrights

Under section 304, copyrights subsisting in their first term when the new law takes effect would last for 28 years from the date they were secured, but could then be renewed for a second term of 47 years. Subsisting renewal copyrights would automatically be extended, and would expire 75 years after first publication or registration. In both cases the bill contains provisions similar but not identical to those of section 203, permitting the termination of transfers and licenses under certain circumstances during the last 19 years of the extended copyright.

CHAPTER 4. COPYRIGHT NOTICE, DEPOSIT, AND REGISTRATION

Sections 401 and 402. General notice requirements

Sections 401 and 402 require that a prescribed notice of copyright appear on all visually perceptible copies of copyrighted works, and on all phonorecords of sound recordings, whether published "in the United States or elsewhere." Unlike the present law, however, compliance with the notice requirements of the bill is not an absolute condition of copyright.

Section 403. Contributions to collective works

Section 403 is aimed at clarifying the situation with respect to contributions published without a copyright notice in collective works

bearing a general notice of their own. A contribution may continue to bear its own notice but, except for independent advertisements, "a single notice applicable to the collective work as a whole" is generally sufficient to cover the separate contributions it contains.

Section 404. Effect of omission of notice

Omission of copyright notice, whether deliberate or inadvertent, would not invalidate a copyright if: (1) the omission was from a "relatively small number" of publicly distributed copies or phonorecords, or (2) copyright registration for the work is made before or within 5 years after the notice was omitted, and a reasonable effort has been made to correct it. In both cases section 404 would shield an innocent infringer, who had been misled by the omission, from liability for actual or statutory damages under certain circumstances.

Section 405. Error in notice with respect to name or date

Under section 405 (a), the use of the wrong name in the copyright notice will not invalidate a copyright. Unless the error has been corrected in the records of the Copyright Office, however, an innocent infringer who had been misled by the error and had acted under the supposed authority of the person named in the notice would have a complete defense. Under subsection (b), an antedated notice might shorten the term of protection but would not otherwise affect the validity of the copyright. Notices postdated by more than 1 year and notices lacking in either a name or date are treated the same as cases where the notice has been omitted altogether.

Section 406. Deposit for the Library of Congress

The deposit of copies or phonorecords for the Library of Congress, and their deposit for registration of a claim to copyright, are closely related but separate under the bill. Under section 406 the right of the Library to obtain copies and phonorecords for its collections would be preserved, but "this deposit is not a condition of copyright protection" and does not need to be coupled with copyright registration. The sanction for failure to comply with the deposit requirements would be a fine rather than loss of copyright protection, and certain categories of material not needed or wanted by the Library could be exempted from the requirements.

Sections 407, 408, 409. Copyright registration

Registration, which would not be required as a basic condition of copyright protection unless the notice had been omitted under 404, could be made at the same time as deposit for the Library, thus allowing a single deposit to serve both purposes. The Register of Copyrights is given authority to establish flexible deposit requirements to cover certain classes of material, thus enabling him to accept optional forms of deposit and the grouping of related works in special cases. Under section 409 the certificate of registration would be "prima facie evidence of the validity of the copyright and of the facts stated in the certificate" if registration is made before or within 5 years after first publication; otherwise the court may give it the evidentiary weight it considers appropriate.

Sections 410 and 411. Effects of failure to register

The present requirement that copyright registration precede the institution of a suit for copyright infringement is retained in section

410, but that section would also permit an applicant whose claim to copyright has been refused registration to maintain an infringement action if the Register of Copyrights is notified and permitted to join the suit. Except for a grace period of 3 months after publication, section 411 would require a court to withhold any award of statutory damages or attorney's fees for infringements occurring before registration.

CHAPTER 5. COPYRIGHT INFRINGEMENT AND REMEDIES

Section 501. Parties to infringement suits

Consistent with the principle of divisibility of copyright established in section 201 (d), section 501 (b) permits the "legal or beneficial owner of an exclusive right under a copyright" to bring suit for infringement "of that particular right committed while he is the owner of it." The subsection also contains provisions with respect to notice, joinder, or intervention of others who may have an interest in the copyright, aimed at protecting their interests and avoiding a multiplicity of suits.

Sections 502 through 508. Remedies for infringement

Aside from damages and profits, the remedies for copyright infringement available under the present law are retained without substantial change in the bill. Under section 504, the copyright owner would be able to elect recovery of either his "actual damages and any additional profits of the infringer," or statutory damages. The bill would permit recovery of profits in addition to actual damages to the extent that they are "attributable to the infringement and are not taken into account in computing the actual damages." The copyright owner could, at his option, recover statutory damages of not less than \$250 or more than \$10,000 for all of the "infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally." The \$10,000 maximum could be increased to \$20,000 in cases of willful infringement; the \$250 minimum could be reduced to \$100 where the infringer was entirely innocent, or could be remitted altogether in the case of "an instructor in a non-profit institution" who infringed by reproducing copyrighted material for classroom use in the honest belief that what he was doing constituted a fair use.

CHAPTER 6. MANUFACTURING REQUIREMENT AND IMPORTATION

Section 601. Manufacture of certain copies in the United States

General requirement.—The present law, which is subject to many exceptions and limitations, requires English-language books and periodicals to be manufactured in the United States in order to be protected for the full copyright term. The works principally affected by this requirement today are those by American authors. Section 601 retains a manufacturing requirement, but with substantial changes that would narrow its scope and prevent it from causing technical forfeitures of protection.

Scope of requirement.—In addition to narrowing the classes of works covered by the manufacturing requirement, section 601 defines "manufacture in the United States" in such a way that the printing of copies in this country from imported "reproduction proofs" would

be outside the scope of the requirement. The number of copies of a foreign edition that could be imported without violation of the requirement would be raised from 1,500 to 2,000.

Enforcement.—Instead of the complete loss of protection that can result from violation of the manufacturing clause today, section 601 provides for the possible loss of certain rights against infringers.

Section 602. Infringing importation

With certain exceptions, the unauthorized importation of “copies or phonorecords of a work that have been acquired abroad” is an infringement of copyright under section 602(a). The limited exceptions apply to importation for governmental use, for use (not sale) by individuals, and for library or archival use; there are special restrictions with respect to audiovisual works. Although an unauthorized importer would be liable for infringement whether the copies he was importing were “piratical” or were lawfully made, the Bureau of Customs would be authorized to exclude only “piratical” copies.

Section 603. Enforcement of importation prohibitions

The prohibitions against importation in sections 601 and 602 would be subject to enforcement under regulations by the Secretary of the Treasury and the Postmaster General. Section 603(b) would permit establishment of a new procedure for dealing with articles alleged to be “piratical,” and subsection (c) deals with the disposition of excluded articles.

CHAPTER 7. COPYRIGHT OFFICE

Section 701 through 708. Administrative provisions

The provisions of chapter 7, dealing with the administrative responsibilities of the Copyright Office, are generally restatements of provisions in the present statute. Section 704 provides for unpublished deposits to be retained throughout the term of copyright and for published deposits to be retained as long as possible; a new procedure would permit applicants to request permanent retention of their deposits. Continued publication of catalogs of copyright registrations is required under section 707, but the Register of Copyrights is given more discretion to determine the form and frequency of publication. The fee schedule in section 708 is consistent with the fees provided by Public Law 89-297, effective November 26, 1965.

SECTIONAL ANALYSIS AND DISCUSSION

In the following analysis and discussion, the hearings referred to are those held on H.R. 4347 in the 89th Congress; and the changes made by the committee are the amendments of H.R. 4347 as introduced in the 89th Congress, which amendments were incorporated in the amended version of H.R. 4347 reported by the committee in the 89th Congress and are incorporated in H.R. 2512, the present bill.

SECTION 102. GENERAL SUBJECT MATTER OF COPYRIGHT

“Original works of authorship”

The two fundamental criteria of copyright protection—originality and fixation in tangible form—are restated in the first sentence of this cornerstone provision. The phrase “original works of authorship,”

which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the present copyright statute. This standard does not include requirements of novelty, ingenuity, or esthetic merit, and there is no intention to enlarge the standard of copyright protection to require them.

In using the phrase "original works of authorship," rather than "all the writings of an author" now in section 2 of the statute, the committee's purpose is to avoid exhausting the constitutional power of Congress to legislate in this field, and to eliminate the uncertainties arising from the latter phrase. Since the present statutory language is substantially the same as the empowering language of the Constitution, a recurring question has been whether the statutory and the constitutional provisions are coextensive. If so, the courts would be faced with the alternative of holding copyrightable something that Congress clearly did not intend to protect, or of holding constitutionally incapable of copyright something that Congress might one day want to protect. To avoid these equally undesirable results, the courts have indicated that "all the writings of an author" under the present statute is narrower in scope than the "writings" of "authors" referred to in the Constitution. The bill avoids this dilemma by using a different phrase—"original works of authorship"—in characterizing the general subject matter of statutory copyright protection.

The history of copyright law has been one of gradual expansion in the types of works accorded protection, and the subject matter affected by this expansion has fallen into two general categories. In the first, scientific discoveries and technological developments have made possible new forms of creative expression that never existed before. In some of these cases the new expressive forms—electronic music, filmstrips, and computer programs, for example—could be regarded as an extension of copyrightable subject matter Congress had already intended to protect, and were thus considered copyrightable from the outset without the need of new legislation. In other cases, such as photographs, sound recordings, and motion pictures, statutory enactment was deemed necessary to give them full recognition as copyrightable works.

Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take. The committee does not intend either to freeze the scope of copyrightable subject matter at the present stage of communications technology or to allow unlimited expansion into areas completely outside the present congressional intent. The committee's statement of the subject matter of copyright protection in section 102 implies neither that that subject matter is unlimited nor that new forms of expression within that general area of subject matter would necessarily be unprotected.

The historic expansion of copyright has also applied to forms of expression which, although in existence for generations or centuries, have only gradually come to be recognized as creative and worthy of protection. The first copyright statute in this country, enacted in 1790, designated only "maps, charts, and books"; major forms of expression such as music, drama, and works of art achieved specific statutory recognition only in later enactments. Although the coverage of the present statute is very broad, and would be broadened further by the added recognition of choreography and sound recordings, there are unquestionably other areas of existing subject matter that this

bill does not propose to protect but that future Congresses may want to.¹

Fixation in tangible form

As a basic condition of copyright protection, the bill perpetuates the existing requirement that a work be fixed in a "tangible medium of expression," and adds that this medium may be one "now known or later developed," and that the fixation is sufficient if the work "can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or a device." This broad language is intended to avoid the artificial and largely unjustifiable distinctions, derived from cases such as *White-Smith Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908), under which statutory copyrightability in certain cases has been made to depend upon the form or medium in which the work is fixed. Under the bill it makes no difference what the form, manner, or medium of fixation may be—whether it is in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form, and whether it is capable of perception directly or by means of any machine or device "now known or later developed."

Under the bill, the concept of fixation is important since it not only determines whether the provisions of the statute apply to a work, but it also represents the dividing line between common law and statutory protection. As will be noted in more detail in connection with section 301, an unfixed work of authorship, such as an improvisation or an unrecorded choreographic work, performance, or broadcast, would continue to be subject to protection under State common law or statute, but would not be eligible for Federal statutory protection under section 102.

At the hearings representatives of broadcasters and organized team sports raised a point that the bill had left unresolved: what should be the status of live broadcasts—sports, news coverage, live performances of music, etc.—that are reaching the public in unfixed form but that are simultaneously being recorded? When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the public and in what order, there is little doubt that what the cameramen and the director are doing constitutes "authorship." The real question to be considered is whether there has been a fixation. If the images and sounds to be broadcast are first recorded (on video tape, film, etc.) and then transmitted, the recorded work would be considered a "motion picture" subject to statutory protection against unauthorized reproduction or retransmission of the broadcast. If, on the other hand, the program content is transmitted live to the public while being recorded at the same time, should the copyright owner be forced to rely on common law rather than statu-

¹ Without implying that they would be wholly without protection under one or another of the seven categories listed in sec. 102, or that they are necessarily the "writings" of "authors" in the constitutional sense, we cite the following as examples. These are areas of subject matter now on the fringes of literary property but not intended, solely as such, to come within the scope of the bill: typography; unfixed performances or broadcast emissions; blank forms and calculating devices; titles, slogans, and similar short expressions; certain three-dimensional industrial designs; interior decoration; ideas, plans, methods, systems, mathematical principles; formats and synopses of television series and the like; color schemes; news and factual information considered apart from its compilation or expression. Many of these kinds of works can be clothed in or combined with copyrightable subject matter and thus achieve a degree of protection under the bill, but any protection for them as separate copyrightable works is not here intended and will require action by a future Congress.

tory rights in proceeding against a community antenna operator for unauthorized retransmission of the live broadcast?

The committee was persuaded that, assuming it is copyrightable—as a “motion picture” or “sound recording,” for example—the content of a live transmission should be regarded as “fixed” and should be accorded statutory protection if it is being recorded simultaneously with its transmission. The discussions on this point, as well as questions raised in connection with computer uses, further emphasized the need for a clear definition of “fixation” that would exclude from the concept purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or captured momentarily in the “memory” of a computer.

The committee therefore added a new definition of “fixed” to section 101. Under the first sentence of this definition a work would be considered “fixed in a tangible medium of expression” if there has been an authorized embodiment in a copy or phonorecord and if that embodiment “is sufficiently permanent or stable” to permit the work “to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” The second sentence makes clear that, in the case of “a work consisting of sounds, images, or both, that are being transmitted,” the work is regarded as “fixed” if a fixation is being made at the same time as the transmission.

Under the new definition, “copies” and “phonorecords” together will comprise all of the material objects in which copyrightable works are capable of being fixed. The definitions of these terms in section 101, together with their usage in section 102 and throughout the bill, reflect a fundamental distinction between the “original work” which is the product of “authorship” and the multitude of material objects in which it can be embodied. Thus, in the sense of the bill, a “book” is not a work of authorship, but is a particular kind of “copy.” Instead, the author may write a “literary work,” which in turn can be embodied in a wide range of “copies” and “phonorecords,” including books, periodicals, computer punch cards, microfilm, tape recordings, and so forth. It is possible to have an “original work of authorship” without having a “copy” or “phonorecord” embodying it, and it is also possible to have a “copy” or “phonorecord” embodying something that does not qualify as an “original work of authorship.” The two essential elements—original work and tangible object—must merge through fixation in order to produce subject matter copyrightable under the statute.

Categories of copyrightable works

The second sentence of section 102 lists seven broad categories which the concept of “works of authorship” is said to “include.” The use of the word “include,” as defined in section 101, makes clear that the listing is “illustrative and not limitative,” and that the seven categories do not necessarily exhaust the scope of “original works of authorship” that the bill is intended to protect. Rather, the list sets out the general area of copyrightable subject matter, but with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories. The items are also overlapping in the sense that a work falling within one class may encompass works coming within some or all of the other categories. In the aggregate, the list covers all categories of works now copyrightable under title 17; in addition, it specifically enumerates “pantomimes and cho-

reographic works," and it creates a new category of "sound recordings."

Several witnesses at the hearings recommended the specific enumeration of additional categories of works in section 102, including oral works, printers' copy and advertising layouts, newspapers, works of stage directors, and works created by a computer. The committee concluded, however, that to the extent these works constitute "original works of authorship" under the statute, they are already included in section 102's list.

Of the seven items listed, four are defined in section 101. The three undefined categories—"musical works," "dramatic works," and "pantomimes and choreographic works"—have fairly settled meanings. There is no need, for example, to specify the copyrightability of electronic or concrete music in the statute since the form of a work would no longer be of any importance, nor is it necessary to specify that "choreographic works" do not include social dance steps and simple routines.

The four terms defined in section 101 are "literary works," "pictorial, graphic, and sculptural works," "motion pictures," and "sound recordings." In each of these cases, definitions are needed not only because the meaning of the term itself is unsettled but also because the distinction between "work" and "material object" requires clarification. Use of the term "literary works" connotes no criterion of literary merit or qualitative value, nor does it exclude things like catalogs and directories.

Correspondingly, the definition of "pictorial, graphic, and sculptural works" carries with it no implied criterion of artistic taste, aesthetic value, or intrinsic quality. The term is intended to comprise everything now covered by classes (f) through (k) of section 5 in the present statute, including not only "works of art" in the traditional sense but also works of graphic art and illustration, art reproductions, plans and drawings, photographs and reproductions of them, maps, charts, globes, and other cartographic works, works of these kinds intended for use in advertising and commerce, and works of "applied art." There is no intention whatever to narrow the scope of the subject matter now characterized in section 5(k) as "prints or labels used for articles of merchandise." However, since this terminology suggests the material object in which a work is embodied rather than the work itself, the bill does not mention this category separately.

In accordance with the Supreme Court's decision in *Mazer v. Stein*, 347 U.S. 201 (1954), works of "applied art" encompass all original pictorial, graphic, and sculptural works that are intended to be or have been embodied in useful articles, regardless of factors such as mass production, commercial exploitation, and the potential availability of design patent protection. The scope of exclusive rights in these works is given special treatment in section 113, to be discussed below.

Enactment of H.R. 4347 will mark the first recognition in American copyright law of sound recordings as copyrightable works. As defined in section 101, copyrightable "sound recordings" are original works of authorship comprising an aggregate of musical, spoken, or other sounds that have been fixed in tangible form. The copyrightable work comprises the aggregation of sounds and not the tangible medium of fixation. Thus, "sound recordings" as copyrightable subject matter are distinguished from "phonorecords," the latter being physi-

cal objects in which sounds are fixed. They are also distinguished from any copyrighted literary, dramatic, or musical works that may be reproduced on a "phonorecord."

The committee believes that, as a class of subject matter, sound recordings are clearly within the scope of the "writings of an author" capable of protection under the Constitution, and that the extension of limited statutory protection to them is overdue. Aside from cases in which sounds are fixed by some purely mechanical means without originality of any kind, the committee favors copyright protection that would prevent the reproduction and distribution of unauthorized phonorecords of sound recordings. The question of broader protection to include rights against public performance is discussed below in connection with section 114 of the bill.

The copyrightable elements in a sound recording will usually, though not always, involve "authorship" both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording. There may be cases where the record producer's contribution is so minimal that the performance is the only copyrightable element in the work, and there may be cases (for example, recordings of birdcalls, sounds of racing cars, et cetera) where only the record producer's contribution is copyrightable. As in the case of motion pictures, the bill does not fix the authorship, or the resulting ownership, of sound recordings, but leaves these matters to the employment relationship and bargaining among the interests involved.

Sound tracks of motion pictures, long a nebulous area in American copyright law, are specifically included in the definition of "motion pictures" and excluded in the definition of "sound recordings." "Motion pictures," as defined, requires three elements: (1) a series of images, (2) the capability of showing the images in a certain successive order, and (3) an impression of motion when the images are thus shown. Coupled with the basic requirements of original authorship and fixation in tangible form, this definition encompasses a wide range of cinematographic works embodied in films, tapes, and other media. However, it would not include: (1) unauthorized fixations of live performances or telecasts, (2) live telecasts that are not fixed simultaneously with their transmission, or (3) filmstrips and slide sets which, although consisting of a series of images intended to be shown in succession, are not capable of conveying an impression of motion.

Following the hearings producers of audiovisual materials urged that, because of their treatment elsewhere in H.R. 4347 as introduced, filmstrips, slide sets, and other audiovisual works should be equated with "motion pictures" rather than "pictorial, graphic, and sculptural works." They argued that, unlike ordinary photographs and pictorial works, audiovisual materials are reproduced in relatively few copies intended for showing to groups rather than in many copies for broad distribution; their sequential showing is closer to a "performance" of a motion picture than to a mere "exhibition" or "display" of a single photograph, and should be controllable to the same extent as motion picture performances.

The committee found these arguments persuasive, and therefore enlarged the scope of clause (6) of section 102 to embrace "motion pictures and other audiovisual works." A new definition of "audio-

visual works" was added to section 101 and, since "motion pictures" would become a species of the larger class of "audiovisual works," corresponding changes were made in the definition of that term. The basic element of the new definition, which would apply to motion pictures and other audiovisual works alike, is a series of related images that are, by their nature, intended for showing by means of projectors or other devices.

SECTION 103. COMPILATIONS AND DERIVATIVE WORKS

Section 103 complements section 102: A compilation or derivative work is copyrightable if it represents an "original work of authorship" and falls within one or more of the categories listed in section 102. Read together, the two sections make plain that the criteria of copyrightable subject matter stated in section 102 apply with full force to works that are entirely original and to those containing preexisting material. Subsection (b) of section 103 is also intended to define, more sharply and clearly than does section 7 of the present law, the important interrelationship and correlation between protection of preexisting and of "new" material in a particular work. The most important point here is one that is commonly misunderstood today: Copyright in a "new version" covers only the material added by the later author, and has no effect one way or the other on the copyright or public domain status of the preexisting material.

Between them the terms "compilations" and "derivative works," which are defined in section 101, comprehend every copyrightable work that employs preexisting material or data of any kind. There is necessarily some overlapping between the two, but they basically represent different concepts. A "compilation" results from a process of selecting, bringing together, organizing, and arranging previously existing material of all kinds, regardless of whether the individual items in that material have been or ever could have been subject to copyright. A "derivative work," on the other hand, requires a process of recasting, transforming, or adapting "one or more preexisting works"; the "preexisting work" must come within the general subject matter of copyright set forth in section 102, regardless of whether it is or was ever copyrighted.

The second part of the sentence that makes up section 103 (a) deals with the status of a compilation or derivative work unlawfully employing preexisting copyrighted material. In providing that protection does not extend to "any part of the work in which such material has been used unlawfully," the bill prevents an infringer from benefiting, through copyright protection, from his unlawful act, but preserves protection for those parts of the work that do not employ the preexisting work. Thus, an unauthorized translation of a novel could not be copyrighted at all, but the owner of copyright in an anthology of poetry could sue someone who infringed the whole anthology, even though the infringer proves that publication of one of the poems was unauthorized. Under this provision, copyright could be obtained as long as the use of the preexisting work was not "unlawful," even though the consent of the copyright owner had not been obtained. For instance, the unauthorized reproduction of a work might be "lawful" under the doctrine of fair use or an applicable foreign law, and if so the work incorporating it could be copyrighted.

SECTION 104. NATIONAL ORIGIN

Section 104 of the bill, which sets forth the basic criteria under which works of foreign origin can be protected under the U.S. copyright law, divides all works coming within the scope of sections 102 and 103 into two categories: unpublished and published. Subsection (a) imposes no qualifications of nationality and domicile with respect to unpublished works. Subsection (b) would make published works subject to protection under any one of four conditions:

(1) The author is a national or domiciliary of the United States or of a country with which the United States has copyright relations under a treaty;

(2) The work is first published in the United States or in a country that is a party to the Universal Copyright Convention;

(3) The work is first published by the United Nations, by any of its specialized agencies, or by the Organization of American States; or

(4) The work is covered by a Presidential proclamation extending protection to works originating in a specified country.

Only two issues were raised during the hearings with respect to this section: the status of unpublished works and the scope of Presidential power to issue proclamations under the fourth condition listed above. As to the first, the decision of the committee was to leave unchanged the provision in H.R. 4347 as introduced. Unpublished works are today protected at common law in the United States irrespective of their author's citizenship or domicile, and no convincing reasons have been advanced to justify cutting off this protection. To do so would also create extraordinary technical complications, and could raise questions of compliance with the Universal Copyright Convention.

On the issue of Presidential proclamations, however, the committee adopted an amendment narrowing somewhat the scope of the President's authority. As introduced, H.R. 4347 would have allowed the issuance of proclamations whenever the President "finds it to be in the national interest," even though the particular country did not grant equivalent protection to works of American authors. While the committee does not propose the establishment of a requirement of strict reciprocity, it believes that proclamations should be based on a finding that the country in question protects U.S. works to some extent and does not discriminate against them. The amendment of section 104(b)(4) in effect adopts the principle of national treatment: The President is authorized to issue a proclamation if he finds that the particular country covered by it extends protection to U.S. works "on substantially the same basis" as to its own works.

SECTION 105. U.S. GOVERNMENT WORKS

The committee agrees with the basic premise of section 105 of the bill and of section 8 of the present law—that works produced for the U.S. Government by its officers and employees should not be subject to copyright—and also agrees that the principle should be applied equally to unpublished and published works. Sharp issues were presented, however, as to the scope of the prohibition and the possibility of allowing exceptions to it.

Scope of the prohibition

The first issue involved the wording of the definition of "work of the United States Government" in subsection (b) of section 105. The 1964 revision bill drafted by the Copyright Office had defined the term as "a work prepared by an officer or employee of the United States Government as part of his official duties." This language was criticized because it differed from the definition of "work made for hire," thus raising questions as to whether the two concepts should be construed differently. The Register explained in his Supplementary Report that no difference was intended; nevertheless, for the sake of uniformity the last phrase in the 1965 bill was changed to read "within the scope of his official duties or employment."

Various author and publisher organizations, together with three Government agencies, took issue with the change on the ground that the new definition could broaden the scope of the prohibition too much. They argued that the definition in H.R. 4347, as introduced, might be construed as ruling out copyright in a work which is prepared by a Government employee at his own initiative but which deals with his experiences while in Government service or with the special field in which he is an expert. They pointed out that the phraseology of the 1964 bill had been used in an earlier judicial decision, and has been accepted in practice as reflecting the present law.

The committee believes generally that a Government official or employee should not be prevented from securing copyright in a work written at his own volition and outside his duties, even though the subject matter involves his Government work or his professional field. Moreover, there is little or no need for uniformity between the definitions of "work of the United States Government" and "work made for hire" as long as the bill denies copyright protection to the former. The language used in the 1964 bill does appear to have acquired some gloss, and we have, therefore, amended the definition by restoring it.

A more difficult and far-reaching problem is whether the definition should be broadened to prohibit copyright in works prepared under U.S. Government contract or grant. As the bill is written, the Government agency concerned could determine in each case whether to allow an independent contractor on grantee to secure copyright in works prepared in whole or in part with the use of Government funds. The argument against allowing copyright in this situation is that the public should not be required to pay a "double subsidy," and that it is inconsistent to prohibit copyright in works by Government employees while permitting private copyrights in a growing body of works created by persons who are paid with Government funds.

The arguments for leaving the bill as it is on this point have come from organizations such as the American Council of Learned Societies, the Association of American University Presses, the National Academy of Sciences, and the National Research Council. They have stressed the large numbers of works involved and the importance of copyright as an incentive to their creation and dissemination. In particular, they have urged that there are basic distinctions between the policy considerations applicable to works written by Government employees and those applicable to works prepared by private organizations with the use of Federal funds.

The committee opposes any sort of outright, unqualified prohibition against copyright in works prepared under Government contract or

grant. There may well be cases where it would be in the public interest to deny copyright in the writings generated by Government research contracts and the like; we assume that, where a Government agency commissions a work for its own use as an alternative to having one of its own employees prepare the work, the right to secure a private copyright would be withheld. However, there are almost certainly many other cases where the denial of copyright protection would be unfair or would hamper the production and publication of important works. Where, under the particular circumstances, Congress or the agency involved finds that the need to have a work freely available outweighs the need of the private author to secure copyright, the problem can be dealt with by specific legislation, agency regulations, or contractual restrictions.

Proposal to allow exceptions

Unlike the 1964 revision bill, the present bill contains no provisions under which copyright in Government works could be secured in exceptional cases. A group of author and publisher organizations, whose viewpoint was shared by the Defense Department, the National Aeronautics and Space Administration, and the Atomic Energy Commission, urged that exceptions be provided for under proper safeguards. They argued that the possibility of copyright protection in certain special cases would offer needed incentives to writing by Government employees, especially in technical fields, that it would encourage publication, offer more effective dissemination, and save the taxpayers substantial amounts, and that it would allow U.S. works to be protected abroad.

On the other hand the Register of Copyrights, with whom the State, Commerce, and Treasury Departments concurred, took the view that the few isolated cases in which copyright protection for a Government work would serve the public interest do not justify the elaborate administrative machinery necessary to establish effective safeguards against abuse. The committee agreed with this conclusion, and leaves the prohibition of section 105(a) unqualified. Truly exceptional cases in which copyright protection can be shown to be justified would be the subject of separate legislative consideration.

Government ownership

The American Bar Association and the American Patent Law Association have adopted positions opposing Government ownership of copyrights. Their opposition presumably relates to the provision of section 105(a), which states that the Government "is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise."

The principal concern here appears to involve ownership of copyrights in works created under Government contracts and grants. For the reasons already outlined, the committee opposes an outright prohibition of copyright protection for works prepared with Government funds, and these reasons are equally applicable to any prohibition of Government ownership that would absolutely foreclose a Government agency from obtaining assignments of copyrights from its contractors and grantees. Like the question of protection, the question of copyright ownership should be considered in the light of the circumstances in individual cases.

Proposed saving clause

Section 8 of the statute now in effect includes a saving clause intended to make clear that the copyright protection of a private work is not affected if the work is published by the Government. This provision serves a real purpose in the present law because of the ambiguity of the undefined term "any publication of the United States Government." Section 105 of the bill, however, uses the operative term "work of the United States Government" and defines it in such a way that privately written works are clearly excluded from the prohibition; accordingly, a saving clause become superfluous.

Two Government agencies have urged retention of a saving clause on the ground that the present statutory provision is frequently cited, and that having the provision expressly stated in the law would avoid questions and explanations. The committee here observes: (1) there is nothing in section 105 that would relieve the Government of its obligation to secure permission in order to publish a copyrighted work; and (2) publication or other use by the Government of a private work would not affect its copyright protection in any way.

SECTION 106. EXCLUSIVE RIGHTS IN COPYRIGHTED WORKS

General scope of copyright

The five fundamental rights that the bill gives to copyright owners—the exclusive rights of reproduction, adaptation, publication, performance, and display—are stated generally in section 106. These exclusive rights, which comprise the so-called "bundle of rights" that is a copyright, are cumulative and may overlap in some cases. Each of the five enumerated rights may be subdivided indefinitely and, as discussed below in connection with section 201, each subdivision of an exclusive right may be owned and enforced separately.

The approach of the bill is to set forth the copyright owner's exclusive rights in broad terms in section 106, and then to provide various limitations, qualifications, or exemptions in the 10 sections that follow. Thus, everything in section 106 is made "subject to sections 107 through 116," and must be read in conjunction with those provisions.

The exclusive rights accorded to a copyright owner under section 106 are "to do and to authorize" any of the activities specified in the five numbered clauses. Use of the phrase "to authorize" is intended to avoid any questions as to the liability of contributory infringers. For example, a person who lawfully acquires an authorized copy of a motion picture would be an infringer if he engages in the business of renting it to others for purposes of unauthorized public performance.

Rights of reproduction, adaptation, and publication

The first three clauses of section 106, which cover all rights under a copyright except those of performance and display, extend to every kind of copyrighted work. The exclusive rights encompassed by these clauses, though closely related, are independent; they can generally be characterized as rights of copying, recording, adaptation, and publishing. A single act of infringement may violate all of these rights at once, as where a publisher reproduces, adapts, and sells copies of a person's copyrighted work as part of a publishing venture. Infringement takes place when any one of the rights is violated:

where, for example, a printer reproduces copies without selling them or a retailer sells copies without having anything to do with their reproduction. The references to "copies or phonorecords," although in the plural, are intended here and throughout the bill to include the singular (1 U.S.C. § 1).

Reproduction.—Read together with the relevant definitions in section 101, the right "to reproduce the copyrighted work in copies or phonorecords" means the right to produce a material object in which the work is duplicated, transcribed, imitated, or simulated in a fixed form from which it can be "perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." As under the present law, a copyrighted work would be infringed by reproducing it in whole or in any substantial part, and by duplicating it exactly or by imitation or simulation. Wide departures or variations from the copyrighted work would still be an infringement as long as the author's "expression" rather than merely his "ideas" are taken.

"Reproduction" under clause (1) of section 106 is to be distinguished from "display" under clause (5). For a work to be "reproduced," its fixation in tangible form must be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." Thus, the showing of images on a screen or tube would not be a violation of clause (1), although it might come within the scope of clause (5).

Preparation of derivative works.—The exclusive right to prepare derivative works, specified separately in clause (2) of section 106, overlaps the exclusive right of reproduction to some extent. It is broader than that right, however, in the sense that reproduction requires fixation in copies or phonorecords, whereas the preparation of a derivative work, such as a ballet, pantomime, or improvised performance, may be an infringement even though nothing is ever fixed in tangible form.

To be an infringement the "derivative work" must be "based upon the copyrighted work," and the definition in section 101 refers to "a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." Thus, to constitute a violation of section 106(2), the infringing work must incorporate a portion of the copyrighted work in some form; for example, a detailed commentary on a work or a programmatic musical composition inspired by a novel would not normally constitute infringements under this clause.

Use in information storage and retrieval systems.—Although it was touched on rather lightly at the hearings, the problem of computer uses of copyrighted material has attracted increasing attention and controversy in recent months. Recognizing the profound impact that information storage and retrieval devices seem destined to have on authorship, communications, and human life itself, the committee is also aware of the dangers of legislating prematurely in this area of exploding technology.

In the context of section 106, the committee believes that, instead of trying to deal explicitly with computer uses, the statute should be general in terms and broad enough to allow for adjustment to future changes in patterns of reproduction and other uses of authors' works.

Thus, unless the doctrine of fair use were applicable, the following computer uses could be infringements of copyright under section 106: reproduction of a work (or a substantial part of it) in any tangible form (paper, punch cards, magnetic tape, etc.) for input into an information storage and retrieval system; reproduction of a work or substantial parts of it, in copies as the "print-out" or output of the computer; preparation for input of an index or abstract of the work so complete and detailed that it would be considered a "derivative work"; computer transmission or display of a visual image of a work to one or more members of the public. On the other hand, since the mere scanning or manipulation of the contents of a work within the system would not involve a reproduction, the preparation of a derivative work, or a public distribution, performance, or display, it would be outside the scope of the legislation.

It has been argued on behalf of those interested in fostering computer uses that the copyright owner is not damaged by input alone, and that the development of computer technology calls for unrestricted availability of unlimited quantities of copyrighted material for introduction into information systems. While acknowledging that copyright payments should be made for output and possibly some other computer uses, these interests recommended at least a partial exemption in cases of reproduction for input. On the other side, the copyright owners stressed that computers have the potential, and in some cases the present, capacity to destroy the entire market of authors and publishers. They consider it indispensable that input, beyond fair use, require the consent of the copyright owner, on the ground that this is the only point in computer operations at which copyright control can be exercised; they argue that the mere presence of an electronic reproduction in a machine could deprive a publisher of a substantial market for printed copies, and that if input were exempted there would likewise be no market for machine-readable copies.

In various discussions since the hearings, there have been proposals for establishing voluntary licensing systems for computer uses, and it was suggested that a commission be established to study the problem and recommend definitive copyright legislation several years from now. The committee expresses the hope that the interests involved will work together toward an ultimate solution of this problem in the light of experience. Toward this end the Register of Copyrights may find it appropriate to hold further meetings on this subject after passage of the new law. In the meantime, however, section 106 preserves the exclusive rights of the copyright owner with respect to reproductions of his work for input or storage in an information system.

Public distribution.—Clause (3) of section 106 establishes the exclusive right of publication: The right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." Under this provision the copyright owner would have the right to control the first public distribution of an authorized copy or phonorecord of his work, whether by sale, gift, loan, or some rental or lease arrangement. Likewise, any unauthorized public distribution of copies or phonorecords that

were unlawfully made would be an infringement. As section 109 makes clear, however, the copyright owner's rights under section 106(3) cease with respect to a particular copy or phonorecord once he has parted with ownership of it.

Rights of public performance and display

Performing rights and the "for profit" limitation.—The right of public performance under section 106(4) extends to "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works" and, unlike the equivalent provisions now in effect, is not limited by any "for profit" requirement. The approach of the bill, as in many foreign laws, is first to state the public performance right in broad terms, and then to provide specific exemptions for educational and other nonprofit uses.

The committee has adopted this approach as more reasonable than the outright exemption of the 1909 statute. It found persuasive the arguments that the line between commercial and "nonprofit" organizations is increasingly difficult to draw, that many "nonprofit" organizations are highly subsidized and capable of paying royalties, and that the widespread public exploitation of copyrighted works by educational broadcasters and other noncommercial organizations is likely to grow. In addition to these trends, it is worth noting that performances and displays are continuing to supplant markets for printed copies and that in the future a broad "not for profit" exemption could not only hurt authors but could dry up their incentive to write.

As will be discussed below in connection with section 114, the bill does not recognize a right of public performance in sound recordings. However, the committee adopted the recommendation, put forward by producers of audiovisual works and book publishers, that the exclusive right of public performance should be expanded to include not only motion pictures but also audiovisual works such as filmstrips and sets of slides. The amendment of section 106(4), which is consistent with the assimilation of motion pictures to audiovisual works throughout the bill, is also related to amendments of the definitions of "display" and "perform" discussed below.

Right of public display.—Clause (5) of section 106 represents the first explicit statutory recognition in American copyright law of an exclusive right to show a copyrighted work, or an image of it, to the public. The existence or extent of this right under the present statute is uncertain and subject to challenge. The bill would give the owners of copyright in "literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works" the exclusive right "to display the copyrighted work publicly."

With the growing use of projection equipment, closed and open circuit television, and computers for displaying images of textual and graphic material to "audiences" or "readers," this right is certain to assume great importance to copyright owners. A recognition of this potentiality is reflected in the proposal of book publishers and producers of audiovisual works which, in effect, would equate "display" with "reproduction" where the showing is "for use in lieu of a copy." The committee is aware that in the future electronic images may take the place of printed copies in some situations, and has dealt with the

problem by amendments in sections 109 and 110, and without mixing the separate concepts of "reproduction" and "display." No provision of the bill would make a purely private display of a work a copyright infringement.

In H.R. 4347 as introduced, the operative word in clause (5) was "exhibit." This term proved confusing and objectionable because of its common usage in referring to the performance of motion pictures. As recommended by the Register of Copyrights, therefore, the committee has substituted the word "display" here and throughout the bill.

Definitions

Section 106 of the 1965 bill included a subsection defining the terms "perform," "exhibit" (i.e., "display"), and "publicly" but, since these terms also occur in other sections, their definitions have been moved to section 101. Each of these definitions has also undergone some amendment.

Under the definitions of "perform," "display," "publicly," and "transmit" now in section 101, the concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public. Thus, for example: a singer is performing when he sings a song; a broadcasting network is performing when it transmits his performance (whether simultaneously or from records); a local broadcaster is performing when it transmits the network broadcast; a community antenna service is performing when it retransmits the broadcast to its subscribers; and any individual is performing whenever he plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set. Although any act by which the initial performance or display is transmitted, repeated, or made to recur would itself be a "performance" or "display" under the bill, it would not be actionable as an infringement unless it were done "publicly," as defined in section 101. Certain other performances and displays, in addition to those that are "private," are exempted or given qualified copyright control under sections 107 through 116.

To "perform" a work, under the definition in section 101, includes reading a literary work aloud, singing or playing music, dancing a ballet or other choreographic work, and acting out a dramatic work or pantomime. A performance may be accomplished "either directly or by means of any device or process," including all kinds of equipment for reproducing or amplifying sounds or visual images, any sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented. As amended by the committee, the definition of "perform" in relation to "a motion picture or other audiovisual work" is "to show its images in sequence or to make the sounds accompanying it audible." The showing of portions of a motion picture, filmstrip, or slide set must therefore be sequential to constitute a "performance" rather than a "display." The purely aural performance of a motion picture sound track, or of the sound portions of an audiovisual work, would constitute a performance of the "motion picture or other audiovisual work"; but, where some of the sounds have been reproduced separately on phonorecords, a performance from the phonorecord would not constitute performance of the motion picture or audiovisual work.

The corresponding definition of "display," as amended, covers any showing of a "copy" of the work, "either directly or by means of a film, slide, television image, or any other device or process." The phrase "motion picture" before the word "film" has been omitted to avoid confusion. Since "copies" are defined as including the material object "in which the work is first fixed," the right of public display applies to original works of art as well as to reproductions of them. With respect to motion pictures and other audiovisual works, it is a "display" (rather than a "performance") to show their "individual images non-sequentially." In addition to the direct showings of a copy of a work, "display" would include the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube or similar viewing apparatus connected with any sort of information-storage and retrieval system.

The definition of "publicly" in connection with performance and display has also undergone some amendment. As explained at pages 23-24 of the Register's Supplementary Report, one of the principal purposes of the definition was to make clear that, contrary to the decision in *Metro-Goldwyn-Mayer Distributing Corp. v. Wyatt*, 21 C.O. Bull. 203 (D. Md. 1932), performances in "semipublic" places such as clubs, lodges, factories, summer camps, and schools are "public performances" subject to copyright control. To accomplish this result, the committee has restored the wording of the 1964 bill: under clause (1) of the definition, a performance or display is "public" if it takes place "at a place open to the public or at a place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."

The term "a family" in this context would include an individual living alone, so that a gathering confined to the individual's social acquaintances would normally be regarded as private. The Department of Defense proposed that the definition be further amended to exclude "an official meeting or gathering of officers or employees of the United States Government"; the committee did not accept this recommendation, but notes that most routine meetings of business and governmental personnel would be excluded because they do not represent the gathering of a "substantial number of persons."

Clause (2) of the definition of "publicly" in section 101 makes clear that the concepts of public performance and public display include not only performances and displays that occur initially in a public place, but also acts that "transmit or otherwise communicate a performance or display of the work to the public by means of any device or process." The definition of "transmit"—to communicate a performance or display "by any device or process whereby images or sounds are received beyond the place from which they are sent"—is broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a "transmission," and if the transmission reaches the public in any form, the case comes within the scope of clauses (4) or (5) of section 106.

Under the bill, as under the present law, a performance made available by transmission to the public at large is "public" even though the recipients are not gathered in a single place, and even if there is no direct proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission. The same principles apply whenever the potential recipients of the transmission represent a limited segment of the public, such as the occupants of hotel rooms or the subscribers of a community antenna television service; they are also applicable where the transmission is capable of reaching different recipients at different times, as in the case of sounds or images stored in an information system and capable of being performed or displayed at the initiative of individual members of the public. To make these principles doubly clear, the committee has amended clause (2) of the definition of "publicly" so that it is applicable "whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."

SECTION 107. FAIR USE

General background of the problem

The judicial doctrine of fair use, one of the most important and well-established limitations on the exclusive rights of copyright owners, would be given express statutory recognition for the first time in section 107. The claim that a defendant's acts constituted a fair use rather than an infringement has been raised as a defense in innumerable copyright actions over the years, and there is ample case law recognizing the existence of the doctrine and applying it. The examples enumerated at page 24 of the Register's 1961 Report, while by no means exhaustive, give some idea of the sort of activities the courts might regard as fair use under the circumstances: "quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located at the scene of an event being reported."

Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. On the other hand, the courts have evolved a set of criteria which, though in no sense definitive or determinative, provide some gauge for balancing the equities. These criteria have been stated in various ways, but essentially they can all be reduced to the four standards which were stated in the 1964 bill and have been adopted again in the committee's amendment of section 107: "(1) the purpose and character of the

use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work."

The controversy over the related problems of fair use and the reproduction of copyrighted material for educational and scholarly purposes began well before the hearings. This problem in copyright law revision received much attention from witnesses at the hearings, and from the committee thereafter.

The fair use provision in H.R. 4347, as introduced, had been reduced to a bare statement that "the fair use of a copyrighted work is not an infringement of copyright." This approach was supported by a wide range of interests on the ground that the doctrine should remain as flexible as possible, and that any attempt at definition could freeze the concept and open the door to massive, unreasonable abuses. On the other side a number of witnesses representing various educational and scholarly organizations criticized the provision as vague and nebulous, and stressed the need of teachers and scholars to be certain whether what they were doing constituted fair use or infringement. They recommended restoration of a part of the provision in the 1964 bill referring to "fair use * * * to the extent reasonably necessary or incidental to a legitimate purpose such as criticism, comment, news reporting, teaching, scholarship, or research."

The group representing educational and scholarly organizations argued further that the doctrine of fair use alone is insufficient to provide the certainty that teachers and other nonprofit educational users of copyrighted material need for their own protection. They emphasized that teachers are not interested in mass copying that actually damages authors and publishers, but that they need to be free to make creative use of all of the resources available to them in the classroom, and that this necessarily involves some reproduction and distribution of copyrighted works such as contemporaneous material in the press, isolated poems and stories for illustrative purposes, and the like. Representatives of the educational group contended that a statute subjecting the use of modern teaching tools to requirements for advance clearance and payment of fees would inhibit use of teachers' imagination and ingenuity, and they proposed adoption of a specific, limited exemption for educational copying that would apply the "not-for-profit" limitation of the present law. They also proposed an amendment of section 504(c) that would allow a court to withhold any award of statutory damages against innocent teachers.

The proposal for a specific educational copying exemption was vigorously opposed by authors and publishers, among a number of others. They characterized the educators' arguments as saying, in effect, that since it is increasingly easy to infringe, violations should be made legal. They maintained that the present "for profit" limitation has nothing to do with copying, and that the argument for exempting educational uses on the ground that they are noncommercial overlooks the serious losses and destruction of incentive that uncompensated educational uses would cause to authors and publishers, particularly in the textbook, reference book, and scientific publishing areas. They stressed that education is the textbook publisher's only market, and that many authors receive their main income from li-

censing reprints in anthologies and textbooks; if an unlimited number of teachers could prepare and reproduce their own anthologies, the cumulative effect would be disastrous. Because photocopying and other reproducing devices are constantly proliferating and becoming easier and cheaper to use, it was claimed that the future of some kinds of publishing is at stake, and that solutions should be sought through reasonable voluntary licensing or clearance arrangements rather than an outright exemption that would hurt authorship, publishing, and ultimately education itself.

The implications of these opposing positions extend far beneath the surface of the specific arguments and involve fundamental questions of social policy. The fullest possible use of the multitude of technical devices now available to education should be encouraged. But, bearing in mind that the basic constitutional purpose of granting copyright protection is the advancement of learning, the committee also recognizes that the potential destruction of incentives to authorship presents a serious danger.

The sharp exchanges between the representatives of authors and publishers and those of educators and scholars at the hearings did not conceal their recognition of common aims and of the need for reasonable accommodation. Several productive meetings were held in June 1966; while no final agreements were reached, the meetings were generally successful in clarifying the issues and in pointing the way toward constructive solutions.

After full consideration, the committee believes that a specific exemption freeing certain reproductions of copyrighted works for educational and scholarly purposes from copyright control is not justified. As shown by a Copyright Office study dated July 22, 1966, the educational groups are mistaken in their argument that a "for profit" limitation is applicable to educational copying under the present law. Any educational uses that are fair use today would be fair use under the bill.

On the other hand, recognizing the need for greater certainty and protection for teachers, the committee has amended section 504(c), as explained below, to insulate a teacher who honestly and reasonably believes what he was doing constituted a fair use from excessive liability for minimum statutory damages. It has also amended section 107 to restore a statement of the four criteria, quoted above, to indicate that a fair use may include "such use by reproduction in copies or phonorecords or by any other means specified by [section 106]," and to characterize a fair use as generally being "for purposes such as criticism, comment, news reporting, teaching, scholarship, or research."

The intention of the committee with respect to the application of the fair use doctrine in various situations is discussed below. It should be emphasized again that, in those situations or any others, the committee has no purpose of either freezing or changing the doctrine. In particular, the reference to fair use "by reproduction in copies or phonorecords or by any other means" should not be interpreted as sanctioning any reproduction beyond the normal and reasonable limits of fair use. The clause was added in response to arguments by educators that, since the case law on fair use has not yet dealt with photocopying and analogous forms of reproduction, section 107 should contain language making clear that the doctrine has as much application in those areas as in any others. In making separate mention of "repro-

duction in copies or phonorecords" in the section, the committee does not intend to give this kind of use any special or preferred status as compared with other kinds of uses. In any event, whether a use referred to in the first sentence of section 107 is a fair use in a particular case will depend upon the application of the determinative factors, including those mentioned in the second sentence.

Intention of the committee

In general.—The expanded statement of the fair use doctrine in amended section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute. We endorse the purpose and general scope of the judicial doctrine of fair use, as outlined earlier in this report, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.

Section 107, as revised by the committee, is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way. However, since this section will represent the first statutory recognition of the doctrine in our copyright law, some explanation of the considerations behind the language used in the list of four criteria is advisable. This is particularly true as to cases of copying by teachers, since in this area there are few if any judicial guidelines.

The committee emphasizes that its statements with respect to each of the criteria of fair use are necessarily subject to qualifications, because they must be applied in combination with the circumstances pertaining to other criteria, and because new conditions arising in the future may alter the balance of equities. It is also important to emphasize that, by singling out some instances to discuss in the context of fair use, we do not intend to indicate that other activities would or would not be beyond fair use. Since most of the testimony before the committee involved teaching activities, the following discussion is related specifically to them, but is should not be inferred that uses of copyrighted material for instructional purposes are subject to different criteria from uses for other purposes.

Reproductions by teachers for classroom purposes.—For the reasons already discussed, the committee does not favor a statutory provision specifying educational uses of copyrighted material that would be free from copyright control. On the other hand, the doctrine of fair use, as properly applied, is broad enough to permit reasonable educational use, and education has something to gain in the enactment of a bill that clarifies what may now be a problematical situation. The committee sympathizes with the argument that a teacher should not be prevented by uncertainty from doing things that he is legally entitled to do and that improve the quality of his teaching. It is therefore important that some ground rules be provided for the application of fair use in particular situations.

The following discussion reflects the considerations lying behind the four criteria listed in the amended section 107, in the context of

typical classroom situations arising today. It must necessarily be broad and illustrative rather than detailed and conclusive, but it may provide educators with the basis for establishing workable practices and policies. Recognizing that our discussion in this report is no final answer to a problem of shifting dimensions, we urge that those affected join together in an effort to establish a continuing understanding as to what constitutes mutually acceptable practices, and to work out means by which permissions for uses beyond fair use can be obtained easily, quickly, and at reasonable fees. Various proposals for some type of Government regulation over fair use and educational reproductions have been discussed since the hearings, but the committee believes that workable voluntary arrangements are distinctly preferable.

The purpose and nature of the use

Copying recognized.—In view of the lack of any judicial precedent establishing that the making of copies by a teacher for classroom purposes can, under appropriate circumstances, constitute a fair use, the educators urged that this general principle be recognized in the statute. The new language of section 107 makes it clear that, assuming the applicable criteria are met, fair use can extend to the reproduction of copyrighted material for purposes of classroom teaching.

Nonprofit element.—Although it is possible to imagine situations in which use by a teacher in an educational organization operated for profit (day camps, language schools, business schools, dance studios, et cetera) would constitute a fair use, the nonprofit character of the school in which the teacher works should be one factor to consider in determining fair use. Another factor would be whether any charge is made for the copies distributed.

Spontaneity.—The fair use doctrine in the case of classroom copying would apply primarily to the situation of a teacher who, acting individually and at his own volition, makes one or more copies for temporary use by himself or his pupils in the classroom. A different result is indicated where the copying was done by the educational institution, school system, or larger unit or where copying was required or suggested by the school administration, either in special instances or as part of a general plan.

Single and multiple copying.—Depending upon the nature of the work and other criteria, the fair use doctrine should differentiate between the amount of a work that can be reproduced by a teacher for his own classroom use (for example, for reading or projecting a copy or for playing a tape recording), and the amount that can be reproduced for distribution to pupils. In the case of multiple copies, other factors would be whether the number reproduced were limited to the size of the class, whether circulation beyond the classroom was permitted, and whether the copies were recalled or destroyed after temporary use. For example, the complete reproduction of a fairly long poem in examination questions distributed to all members of a class might be fair use, while the distribution of separate copies of the poem without restrictions might not be.

Collections and anthologies.—Spontaneous copying of an isolated extract by a teacher, which may be a fair use under appropriate cir-

cumstances, could turn into an infringement if the copies were accumulated over a period of time with other parts of the same work, or were collected with other material from various works so as to constitute an anthology.

Special uses.—There are certain classroom uses which, because of their special nature, would not be considered an infringement in the ordinary case. For example, copying of extracts by pupils as exercises in a shorthand or typing class or for foreign language study, or recordings of performances by music students for purposes of analysis and criticism, would normally be regarded as a fair use unless the copies or phonorecords were retained or duplicated.

The nature of the copyrighted work

Character of the work.—The character and purpose of the work will have a lot to do with whether its reproduction for classroom purposes is fair use or infringement. For example, in determining whether a teacher could make one or more copies without permission, a news article from the daily press would be judged differently from a full orchestral score of a musical composition. In general terms, it could be expected that the doctrine of fair use would be applied strictly to the classroom reproduction of entire works, such as musical compositions, dramas, and audiovisual works including motion pictures, which by their nature are intended for performance or public exhibition.

Similarly, where the copyrighted work is intended to be “consumable” in the course of classroom activities—workbooks, exercises, standardized tests, and answer sheets are examples—the privilege of fair use by teachers or pupils would have little if any application. Textbooks and other material prepared primarily for the school market would be less susceptible to reproduction for classroom use than material prepared for general public distribution. With respect to material in newspapers and periodicals the doctrine of fair use should be liberally applied to allow copying of items of current interest to supplement and update the students’ textbooks, but this would not extend to copying from periodicals published primarily for student use.

Availability of the work.—A key, though not necessarily determinative, factor in fair use is whether or not the work is available to the potential user. If the work is “out of print” and unavailable for purchase through normal channels, the user may have more justification for reproducing it than in the ordinary case, but the existence of organizations licensed to provide photocopies of out-of-print works at reasonable cost is a factor to be considered. The applicability of the fair use doctrine to unpublished works is narrowly limited since, although the work is unavailable, this is the result of a deliberate choice on the part of the copyright owner. Under ordinary circumstances the copyright owner’s “right of first publication” would outweigh any needs of reproduction for classroom purposes.

The amount and substantiality of the material used

Single copies of “entire” works.—In the various discussions of educational copying at the hearings and thereafter, a question that has never been resolved involves the difference between an “entire work” and an “excerpt.” The educators have sought a limited right for a teacher to make a single copy of an “entire” work for classroom purposes. The committee understands that this was not generally in-

tended to extend beyond a "separately cognizable" or "self-contained" portion (for example, a single poem, story, or article) in a collective work, and that no privilege is sought to reproduce an entire collective work (for example, an encyclopedia volume, a periodical issue) or a sizable integrated work published as an entity (a novel, treatise, monograph, and so forth). With this limitation, and subject to the other relevant criteria, the requested privilege of making a single copy appears appropriately to be within the scope of fair use.

Multiple copies of "excerpts."—The educators also sought statutory authority for the privilege of making "a reasonable number of copies or phonorecords for excerpts or quotations * * *, provided such excerpts or quotations are not substantial in length in proportion to their source." In general, and assuming the other necessary factors are present, the committee agrees that the copying for classroom purposes of extracts or portions, which are not self-contained and which are relatively "not substantial in length" when compared to the larger, self-contained work from which they are taken, should be considered fair use. Depending on the circumstances, the same may also be true of very short self-contained works such as a four-line poem, a map in a newspaper, a one-half page "vocabulary builder" from a monthly magazine, and so forth.

Effect of use on potential market for or value of work.—This factor, while often the most important of the criteria of fair use, must almost always be judged in conjunction with the other three criteria. With certain special exceptions (use in parodies or as evidence in court proceedings might be examples) a use which supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement. As in any other case, whether this would be the result of reproduction by a teacher for classroom purposes requires an evaluation of the nature and purpose of the use, the type of work involved, and the size and relative importance of the portion taken. Fair use is essentially supplementary by nature, and classroom copying that exceeds the legitimate teaching aims such as filling in missing information or bringing a subject up to date would go beyond the proper bounds of fair use. Where the unauthorized copying displaces what realistically might have been a sale, no matter how minor the amount of money involved, the interests of the copyright owner need protection. Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copying that must be prevented.

Reproductions and uses for other purposes.—The concentrated attention given the fair use provision in the context of classroom teaching activities should not obscure its application in other areas. The committee emphasizes again that the same general standards of fair use are applicable to all kinds of uses of copyrighted material, although the relative weight to be given them will differ from case to case.

For example, the doctrine of fair use would apply to all stages in the operations of information storage and retrieval systems, including input, and output in the form of visual images or hard copies. Reproduction of small excerpts or key words for purposes of input, and output of bibliographic lists or short summaries, might be examples of fair use in this area. On the other hand, because the potential

capabilities of a computer system are vastly different from those of a mimeograph or photocopying machine, the factors to be considered in determining fair use would have to be weighed differently in each situation. For reasons already explained, the committee does not favor any statutory provision that would exempt computer uses specially from copyright control or that would specify that certain computer uses constitute fair use.

Similarly, the fair use doctrine would be relevant to the use of excerpts from copyrighted works in educational broadcasting activities not exempted under sections 110(2) or 112. In these cases there would be other special factors to weigh: whether the performers, producers, directors, and others responsible for the broadcast were paid, the size and nature of the audience, the size and number of excerpts taken and, in the case of recordings made for broadcast, the number of copies reproduced and the extent of their reuse or exchange. The availability of the fair use doctrine to educational broadcasters would be narrowly circumscribed in the case of motion pictures and other audiovisual works, but under appropriate circumstances it could apply to the non-sequential showing of an individual still or slide, or to the performance of a short excerpt from a motion picture for criticism or comment.

As explained at pages 26 and 27 of the Register's Supplementary Report, an earlier effort to specify limited conditions under which libraries could supply photocopies of material was strongly criticized by both librarians and copyright owners, though for opposing reasons. The effort was dropped, and at the hearings representatives of librarians urged that it not be revived; their position was that statutory provisions codifying or limiting present library practices in this area would crystallize a subject better left to flexible adjustment. On the other hand, both the American Council of Learned Societies and the Department of Health, Education, and Welfare argued that the problem is too important to be left uncertain, and proposed adoption of a statutory provision allowing libraries to supply single photocopies of material under limited conditions.

As in the case of reproduction of copyrighted material by teachers for classroom use, the committee does not favor a specific provision dealing with library photocopying.

Unauthorized library copying, like everything else, must be judged a fair use or an infringement on the basis of all of the applicable criteria and the facts of the particular case. Despite past efforts, reasonable arrangements involving a mutual understanding of what generally constitutes acceptable library practices, and providing workable clearance and licensing conditions, have not been achieved and are overdue. The committee urges all concerned to resume their efforts to reach an accommodation under which the needs of scholarship and the rights of authors would both be respected.

A question that came up several times during the hearings was whether the specific exemptions for certain uses, such as those provided by sections 110 and 112, should be in addition to or instead of fair use. In other words, if an educational broadcaster failed to qualify for the exemption in section 110(2) because a particular program was not instructional, could he still claim that his use of excerpts from a copyrighted work was "fair" and therefore exempt? It is the committee's intention that the fair use principle provide a potential limita-

tion on all of the copyright owner's exclusive rights, whether they are subject to other, specific limitations or not. Thus, while some of the exemptions in sections 108 through 116 may overlap the fair use doctrine, they are not intended to supersede it.

Proposals for presumptions as to fair use

The representatives of various educational organizations proposed that, in infringement cases involving nonprofit uses for educational purposes, the use be presumed to be "fair" and the burden of proving otherwise be placed on the copyright owner. The representatives of authors and book publishers objected strenuously to this proposal, arguing that it would transform the doctrine of fair use into a blanket exemption in these cases.

The committee believes that any special statutory provision placing the burden of proving fair use on one side or the other would be unfair and undesirable. It has, however, added a provision to section 504(c), allowing minimum statutory damages to be reduced in these cases if the teacher proves that he acted in the reasonable belief that his reproduction constituted a fair use rather than an infringement.

SECTION 108. REPRODUCTION OF WORKS IN ARCHIVAL COLLECTIONS

Although the committee does not favor special fair use provisions dealing with the problems of library photocopying, it was impressed with the need for a specific exemption permitting reproduction of manuscript collections under certain conditions. Arguments were made by representatives of archivists and historians, the General Services Administration, and the American Council on Education for a statutory provision that would authorize archival institutions to make facsimiles of unpublished works in order to deposit copies in other manuscript collections. They emphasized that the unpublished material in archival collections, which the bill gives statutory protection for the first time, is of little interest to copyright owners but of great historical and scholarly value. They urged that a limited right to duplicate archival collections would not harm the copyright owners' interests but would aid scholarship and enable the storage of security copies at a distance from the originals.

The response to these recommendations was generally sympathetic, and there was little or no opposition to them. The committee has therefore adopted a new provision, section 108, under which a "non-profit institution, having archival custody over collections of manuscripts, documents, or other unpublished works of value to scholarly research," would be entitled to reproduce "any such work in its collections" under certain circumstances. Only unpublished works could be reproduced under this exemption, but the privilege would extend to any type of work, including photographs, motion pictures, and sound recordings.

The archival reproduction privilege accorded by section 108 would be available only where there was no "purpose of direct or indirect commercial advantage," and where the copies or phonorecords are reproduced in "facsimile." Under the exemption, for example, a repository could make photocopies of manuscripts by microfilm or electrostatic process, but could not reproduce the work in "machine-readable" language for storage in an information system.

The purposes of the reproduction must either be "preservation and security" or "deposit for research use in any other such institution." Thus, no facsimile copies or phonorecords made under this section can be distributed to scholars or the public; if they leave the institution that reproduced them, they must be deposited for research purposes in another "nonprofit institution" that has "archival custody over collections of manuscripts, documents, or other unpublished works of value to scholarly research."

This section is not intended to override any contractual arrangements under which the manuscript material was deposited in the institution. For example, if there is an express contractual prohibition against reproduction for any purpose, section 108 could not be construed as justifying a violation of the contract.

SECTION 109. EFFECT OF TRANSFER OF PARTICULAR COPY OR PHONORECORD

Effect on further disposition of copy or phonorecord

Section 109 (a) restates and confirms the principle that, where the copyright owner has transferred ownership of a particular copy or phonorecord of his work, the person to whom the copy or phonorecord is transferred is entitled to dispose of it by sale, rental, or any other means. Under this principle, which has been established by the court decisions and section 27 of the present law, the copyright owner's exclusive right of public distribution would have no effect upon anyone who owns "a particular copy or phonorecord lawfully made under this title" and who wishes to transfer it to someone else or to destroy it.

Thus, for example, the outright sale of an authorized copy of a book frees it from any copyright control over its resale price or other conditions of its future disposition. A library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose. This does not mean that conditions on future disposition of copies or phonorecords, imposed by a contract between their buyer and seller, would be unenforceable between the parties as a breach of contract, but it does mean that they could not be enforced by an action for infringement of copyright. Under section 202, however, the owner of the physical copy or phonorecord cannot reproduce or perform the copyrighted work publicly without the copyright owner's consent.

To come within the scope of section 109(a), a copy or phonorecord must have been "lawfully made under this title," though not necessarily with the copyright owner's authorization. For example, any resale of an illegally "counterfeited" phonorecord would be an infringement, but the disposition of a phonorecord made under the compulsory licensing provisions of section 115 would not.

Effect on display of copy

Subsection (b) of section 109 deals with the scope of the copyright owner's exclusive right to control the public display of a particular "copy" of his work (including the original or prototype copy in which the work was first fixed). Assuming, for example, that a painter has sold his only copy of an original work of art without restrictions, would he be able to restrain the new owner from displaying it publicly in galleries, shop windows, on a projector, or on television?

Section 109(b) adopts the general principle that the lawful owner of a copy of a work should be able to put his copy on public display without the consent of the copyright owner. The exclusive right of public display granted by section 106(5) would not apply where the owner of a copy wishes to show it directly to the public, as in a gallery or display case, or indirectly, as through an opaque projector. Where the copy itself is intended for projection, as in the case of a photographic slide, negative, or transparency, the public projection of a single image would be permitted as long as the viewers are "present at the place where the copy is located."

On the other hand, section 109(b) takes account of the potentialities of the new communications media, notably television and information storage and retrieval devices, for replacing printed copies with visual images. Under the 1965 bill, the public display of an image of a copyrighted work would not be exempted from copyright control if the copy from which the image was derived were outside the presence of the viewers. In other words, the display of a visual image of a copyrighted work would be an infringement if the image were transmitted by any method (by closed or open circuit television, for example, or by a computer system) from one place to members of the public located elsewhere.

The committee adopted this provision and carried it a step further as a needed safeguard to copyright owners: as amended, the exemption would extend only to public displays that are made "either directly or by the projection of no more than one image at a time." Thus, even where the copy and the viewers are located at the same place, the simultaneous projection of multiple images of the work would not be exempted. For example, where each person in a lecture hall has his own viewing apparatus in front of him, the copyright owner's permission would generally be required in order to project an image of a work on each individual screen at the same time.

The committee's intention is to preserve the traditional privilege of the owner of a copy to display it directly, but to place reasonable restrictions on his ability to display it indirectly in such a way that the copyright owner's market for reproduction and distribution of copies would be affected. Unless it constitutes a fair use under section 107, or unless one of the special provisions of sections 110 or 111 is applicable, projection of more than one image at a time, or transmission of an image to the public over television or other communications channels, would be an infringement for the same reasons that reproduction in copies would be. The committee regards as too inflexible a suggestion for defining "the place where the copy is located" as "a room or limited outdoor area," but the concept is generally intended to mean that the viewers are present in the same physical surroundings as the copy, even though they cannot see the copy directly.

Effect of mere possession of copy or phonorecord

Subsection (c) of section 109 qualifies the privileges specified in subsections (a) and (b) by making clear that they do not apply to someone who merely possesses a copy or phonorecord without having acquired ownership of it. Acquisition of an object embodying a copyrighted work by rental, lease, loan, or bailment carries with it no

privilege to dispose of the copy under section 109(a) or to display it publicly under section 109(b). To cite a familiar example, a person who has rented a print of a motion picture from the copyright owner would have no right to rent it to someone else without the owner's permission.

SECTION 110. EXEMPTION OF CERTAIN PERFORMANCES AND DISPLAYS.

In H.R. 4347 as originally introduced, section 110 (which was then section 109) contained seven clauses. Clauses (1) through (4) dealt with performances and exhibitions that are now generally exempt under the "for profit" limitation or other provisions of the copyright law, and that would be specifically exempted under the bill. Clauses (5) and (6) provided exemptions for certain secondary transmissions, specifically nonprofit "boosters" or translators and relays of broadcasts to hotel rooms. The seventh clause dealt with the mere reception of broadcasts in a public place. The section did not contain any provision covering the operations of commercial community antenna systems, since they were intended to be fully liable for copyright infringement under that bill.

For the reasons explained below, the committee has decided to give special treatment to the entire problem of secondary transmissions, including community antenna systems. Clauses (5) and (6) in the 1965 bill have therefore been taken out of what is now section 110 and have been incorporated with some amendments in section 111. Since it does not involve a secondary transmission, clause (7) has been retained in section 110, and becomes clause (5) of that provision.

In addition to the performances and displays exempted from copyright control under section 110, the committee considered the proposal of the Department of Defense to exempt transmissions "made by the United States Government primarily for reception by United States Government employees, including military personnel, and their families." A new provision has been added to section 110(2) exempting certain instructional transmissions to Government personnel; but, with respect to transmission of programs intended for general entertainment, the committee does not believe the Government should be placed in any preferred position.

Face-to-face teaching activities

Clause (1) of section 110 is generally intended to set out the conditions under which performances or displays, in the course of instructional activities other than educational broadcasting, are to be exempted from copyright control. As amended, the clause covers all types of copyrighted works, and exempts their performance or display "by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution," where the activities take place "in a classroom or similar place devoted to instruction." The committee does not regard a statutory definition of "face-to-face teaching activities" as necessary to clarify the scope of the provision, but will explain what the clause is intended to cover in some detail here.

Works affected.—Since there is no limitation on the types of works covered by the exemption, a teacher or student would be free to perform or display anything in class as long as the other conditions of the clause are met. He could read aloud from copyrighted text ma-

terial, act out a drama, play or sing a musical work, perform a motion picture or filmstrip, or display text or pictorial material to the class by means of a projector. However, nothing in this provision is intended to sanction the unauthorized reproduction of copies or phonorecords for the purpose of classroom performance or display, and the amended clause contains a special exception dealing with performances from unlawfully made copies of motion pictures and other audiovisual works, to be discussed below.

Instructors or pupils.—To come within clause (1), the performance or display must be “by instructors or pupils,” thus ruling out performances by actors, singers, or instrumentalists brought in from outside the school to put on a program. However, the term “instructors” would be broad enough to include guest lecturers if their instructional activities remain confined to a classroom situation. In general, the term “pupils” refers to the enrolled members of a class.

Face-to-face teaching activities.—Use of the phrase “in the course of face-to-face teaching activities” is intended to exclude broadcasting or other transmissions into a classroom, whether radio or television and whether open or closed circuit. However, as long as the instructor and pupils are in the same classroom or similar place, the exemption would extend to the use of devices for amplifying or reproducing sound and for projecting visual images. The “teaching activities” exempted by the clause encompass systematic instruction of a very wide variety of subjects, but they do not include performances or displays, whatever their cultural value or intellectual appeal, that are given for the recreation or entertainment of any part of their audience.

Nonprofit educational institution.—The committee has amended clause (1) to make clear that it applies only to the teaching activities “of a nonprofit educational institution,” thus excluding from the exemption performances or displays in profit-making institutions such as dance studios and language schools.

Classroom or similar place.—The teaching activities exempted by the clause must take place “in a classroom or similar place devoted to instruction.” For example, performances in an auditorium or stadium during a school assembly, graduation ceremony, class play, or sporting event, where the audience is not confined to the members of a particular class, would fall outside the scope of clause (1), although in some cases they might be exempted by clause (4) of section 110. The “similar place” referred to in clause (1) is a place which is “devoted to instruction” in the same way a classroom is; common examples would include a studio, a workshop, a gymnasium, a training field, a library, the stage of an auditorium, or the auditorium itself if it is actually used as a classroom for systematic instructional activities.

Motion pictures and other audiovisual works.—The committee has added a new provision to clause (1) to deal with the special problem of performances from unlawfully made copies of motion pictures and other audiovisual works. The exemption is lost where the copy being used for a classroom performance was “not lawfully made under this title” and the person responsible for the performance knew or had reason to suspect as much. This special exception to the exemption would not apply to performances from lawfully made copies, even if the copies were acquired from someone who had stolen or converted

them, or if the performances were in violation of an agreement. However, though the performances would be exempt under section 110(1) in such cases, the copyright owner might have a cause of action against the unauthorized distributor under section 106(3), or against the person responsible for the performance for breach of contract.

Projection devices.—As long as there is no transmission beyond the place where the copy is located, both section 109(b) and section 110(1) would permit the classroom display of a work by means of any sort of projection device or process. The committee recognizes the legitimate concern of book publishers and others with respect to the use of visual images in education to supplant the need for printed copies, but believes that the real problem is met by its amendments of section 110(2).

Instructional broadcasting

Together with those of section 112, the amended provisions of section 110(2) represent the committee's answer to one of the major issues in copyright law revision: "the extent to which educational and other nonprofit broadcasting should be exempted from copyright control." The bill as originally introduced dropped the existing general exemption for all transmissions that are not "for profit," and in clause (2) drew a line between instructional broadcasting that is an adjunct to the actual classwork of educational institutions, and "educational broadcasting" intended for the enlightenment, cultural enrichment, or instruction of the public at large. The Register's Supplementary Report, at page 35, explains this distinction as follows:

Here is a case where balancing the scales is a delicate undertaking. Fully acknowledging the unique public value of educational broadcasting and its need for financial support, we must also recognize the large public audiences it is now reaching, the vast potential audiences that are awaiting it, and the fact that, as a medium for entertainment, recreation, and communication of information, a good deal of educational programing is indistinguishable from a good deal of commercial programing. The time may come when many works will reach the public primarily through educational broadcasting. In terms of good education it is certainly true that the more people reached the better; but in terms of the author's rights it is equally true that the more people reached the more he should be compensated. It does not seem too much to ask that some of the money now going to support educational broadcasting activities be used to compensate authors and publishers whose works are essential to those activities.

At the hearings the provisions of the 1965 bill on educational broadcasting were generally supported by authors, publishers, and performing rights societies, and were opposed by educational broadcasters and other educational organizations. The basic argument on behalf of copyright owners was that, although the growth of educational broadcasting and the variety of its programing should be strongly supported, it is vital that authors and publishers be remunerated. In the view of the copyright owners, the 1965 bill gave educational broadcasters all of the privileges they reasonably should have with respect to "in-school" instructional transmissions, and

they expressed serious concern about broadening these privileges. They stressed that the line between general educational programming of a cultural nature, and "sustaining" or "public service" programs on commercial stations, has broken down, and that in many cases the two are indistinguishable as to content, size of audience, use of copyrighted material, and impact on the copyright owner.

In support of their position, the representatives of authors and publishers argued that educational broadcasting is growing, and that it already reaches huge audiences and is highly subsidized from both government and private commercial sources. They attacked as illogical and unfair a situation where performers are paid but an author's work can be freely used and his market ruined without compensation. It was pointed out, in this connection, that educational broadcasting is a principal user of serious music, and yet is asking the serious composer, its "worst victim," to subsidize it involuntarily. The copyright owners asserted that in other countries, where most or all broadcasting is "nonprofit," it would be inconceivable for authors not to be paid, and they undertook to work toward licensing arrangements at reasonable fees.

For their part, the educational interests stressed the great national importance of educational broadcasting, not only as an adjunct to the schools but also in providing adult education, promoting general cultural interests, combating illiteracy, and supporting the anti-poverty program through vocational rehabilitation classes. They argued that the 1965 bill would severely reduce the educational potential of radio and television, and would thus run counter to the expressed policies of Congress and the administration.

The educational groups felt that, by confining the exemption to "in-school" transmissions, the 1965 bill would thwart a basic function of educational broadcasting: its unparalleled capacity for reaching students widely separated geographically and economically. They urged that educational broadcasting needs maximum access with a minimum of restrictions, and that its tiny budgets cannot support the costs and uncertainties of expensive clearances and royalties. Asserting that their activities are truly nonprofit and dedicated to public service, the educational broadcasters pointed out that they compete with commercial television only in the sense that they are seeking more viewers; use of copyrighted material on television has been shown to stimulate an interest in particular copyrighted works, and to create a cultural atmosphere in which the demand for copies of works increases.

The arguments on both sides, while advanced in support of opposite positions, struck the committee as fundamentally valid and as pointing the way toward a middle course. Following the hearings, representatives of the various interests affected met together to discuss the problem and, though no definite agreements emerged from the meetings, certain areas of possible accommodation were suggested. Very recently, proposals for a nationwide communications satellite system that would directly benefit educational broadcasting have underlined the need for copyright solutions that will preserve the rights of copyright owners, but without impairing the growth of educational broadcasting or the important services it performs for the Nation. Acting on this premise, the committee broadened the exemptions in clause (2) in some respects and narrowed them somewhat in others.

The following is a summary of the intention behind section 110(2), as here reported.

Works affected.—The exemption would apply only to “performance of a nondramatic literary or musical work, or display of a work.” Thus, the copyright owner’s permission would be required for the performance on educational television or radio of a dramatic work, of a dramatico-musical work such as an opera or musical comedy, or of a motion picture. Since, as already explained, audiovisual works such as filmstrips are now equated with motion pictures, their sequential showing would be regarded as a performance rather than a display and would not be exempt under section 110(2). The clause is not intended to limit in any way the copyright owner’s exclusive right to make dramatizations, adaptations, or other derivative works under section 106(2). Thus, for example, a performer could read a nondramatic literary work aloud under section 110(2), but the copyright owner’s permission would be required for him to act it out in dramatic form.

Source of transmission.—Under clause (2) in the 1965 bill, the nature of the organization making the transmission was not specified, and could have included an organization in business for profit. The committee’s amendment makes clear that the transmitter must be “a governmental body or other nonprofit organization” in order for the exemption to apply.

Systematic instructional activities.—Under section 110(2) a transmission must meet four specified conditions in order to be exempted from copyright liability. The first of these, as provided by subclause (A), is that the performance or display must be “a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution.” The concept of “systematic instructional activities” is intended as the general equivalent of “curriculums,” but it could be broader in a case such as that of an institution using systematic teaching methods not related to specific course work. A transmission would be a regular part of these activities if it is in accordance with the pattern of teaching established by the governmental body or institution.

The “nonprofit educational institution” referred to in clause (A) represents a narrower concept than the “nonprofit organization” referred to in the introductory part of the clause; the transmitting “organization” must be nonprofit but need not be engaged primarily in educational activities, while the public or private “institution” encompassed by subclause (A) must not only be nonprofit but must also be engaged primarily and directly in some kind of systematic instruction. The committee has amended the clause to include, beyond the concepts of “nonprofit organization” and “nonprofit educational institution,” the instructional broadcasting activities of “a governmental body.”

Radius of transmission.—Subclause (B) of section 110(2), which was added by the committee, confines the exemption to transmissions normally encompassing an area whose radius is not over 100 miles. The basic theory of the instructional broadcasting exemption in clause (2) is that the permitted uses of copyrighted material are made through local transmitting organizations and are generally part of the instructional activities of local educational institutions. This

theoretical base would be eroded or destroyed if, as now seems entirely possible through the use of communications satellites, for example, a nationwide network of simultaneous educational transmissions were established, and if teaching methods based on visual images rather than printed copies continue to evolve. The prospects of very serious damage to copyright owners if this happened impressed the committee as real. A radius of 100 miles is substantially larger than the areas normally encompassed by existing educational transmitters, but would still confine the copyright impact of both section 110(2) and of section 112(b) (with respect to ephemeral recordings for instructional broadcasts) to local situations.

Intended recipients.—Another major amendment made by the committee in clause (2) was to enlarge the classes of recipients for whom the exempted transmission is “primarily made.” Under the exemption in the 1965 bill, it was necessary for the transmission to be “made primarily for reception in classrooms or similar places normally devoted to instruction.” This requirement has been retained as paragraph (i) of section 110(2)(C), but two alternatives have been added as paragraphs (ii) and (iii); an instructional transmission may be exempt if it is made primarily for reception by handicapped persons in their homes or by government employees in connection with their training.

In all three cases, the instructional transmission need only be made “primarily” rather than “solely” to the specified recipients to be exempt. Thus, the transmission could still be exempt even though it is capable of reception by the public at large. Conversely, it would not be regarded as made “primarily” for one of the required groups of recipients if the principal purpose behind the transmission is reception by the public at large, even if it is cast in the form of instruction and is also received in classrooms. Factors to consider in determining the “primary” purpose of a program would include its subject matter, content, and the time of its transmission.

Paragraph (i) of subclause (C) generally covers what are known as “in-school” broadcasts, whether open- or closed-circuit. The reference to “classrooms or similar places” here is intended to have the same meaning as that of the phrase as used in section 110(1). The new exemption in paragraph (ii) was added in response to the urgent requests of educational broadcasters, who emphasized that one of their unique advantages over traditional teaching methods is their ability to bring instruction to new segments of the population who for various reasons cannot be brought together in classrooms; examples included preschool children, displaced workers, illiterates, and shut-ins. On the part of authors and publishers, serious misgivings were expressed about any expansion of the exemption that could free “cultural” programs, aimed at the general public, from copyright. The committee recognizes the validity of the arguments on both sides of the issue, and has broadened the exemption to accomplish no more than the purpose of providing systematic instruction to individuals who cannot be reached in classrooms because of “their disabilities or other special circumstances.”

The third exemption in subclause (C) is also new, and was adopted by the committee in response to suggestions by the Department of Defense. It is intended to permit the use of copyrighted material, in ac-

cordance with the other conditions of section 110(2), in the course of instructional transmissions to Government personnel who are receiving training "as a part of their official duties or employment."

Control of time and content.—A point of serious concern to authors and book publishers, among others, has been the possible danger that in the future, section 110(2) would be construed to exempt transmissions of visual images from a computer or "memory bank" to individual students in classrooms, and that such transmissions would displace the market for textbooks, workbooks, tests, answer sheets, and other instructional material. Recent developments in teaching indicate that these fears may be justifiable. Clause (2) of section 110 was intended to deal primarily with instructional broadcasting as it is now understood, and was not intended to exempt the transmission of visual images to individual students at their control, thereby substituting for copies. The committee has therefore adopted subclause (D) to confine the exemption to what was intended. Under the new subclause, the exemption would not apply if "the time and content of the transmission," rather than being controlled by the transmitting organization, "depend on a choice by individual recipients in activating transmission from an information storage and retrieval system or any similar device, machine, or process."

Religious services

The exemption in clause (3) of section 110 covers performances of a nondramatic literary or musical work "or of a dramatico-musical work of a religious nature," and displays of works of all kinds, "in the course of services at a place of worship or other religious assembly." The scope of the clause does not cover the sequential showing of motion pictures and other audiovisual works. The exemption, which to some extent has its counterpart in sections 1 and 104 of the present law, was amended by the committee to add the phrase "of a religious nature" qualifying the term "dramatico-musical work." The purpose here is to exempt certain performances of sacred music that might be regarded as "dramatic" in nature, such as oratorios, cantatas, musical settings of the mass, choral services, and the like. The exemption is not intended to cover performances of secular operas, musical plays, motion pictures, and the like, even if they have an underlying religious or philosophical theme and take place "in the course of [religious] services."

To be exempted under section 110(3) a performance or display must be "in the course of services," thus excluding activities at a place of worship that are for social, educational, fund raising, or entertainment purposes. Some performances of these kinds could be covered by the exemption in section 110(4), discussed next. Since the performance or display must also occur "at a place of worship or other religious assembly," the exemption would not extend to religious broadcasts or other transmissions to the public at large, even where the transmissions were sent from the place of worship. On the other hand, as long as services are being conducted before a religious gathering, the exemption would apply if they were conducted in places such as auditoriums, outdoor theaters, and the like.

Certain other nonprofit performances

In addition to the educational and religious exemptions provided by clauses (1) through (3) of section 110, clause (4) contains a general

exception to the exclusive right of public performance that would cover some, though not all, of the same ground as the present "for profit" limitation. The following is a summary of the clause as amended by the committee.

Scope of exemption.—The exemption in clause (4) applies to the same general activities and subject matter as those covered by the "for profit" limitation today: public performances of nondramatic literary and musical works. However, the exemption would be limited to public performances given directly in the presence of an audience whether by means of living performers, the playing of phonorecords, or the operation of a receiving apparatus, and would not include a "transmission to the public." Although educational broadcasters sought a blanket exemption under clause (4) in cases where none of the performers was paid, the committee decided that the exemption of educational broadcasting activities should be confined within the scope of section 110(2). Unlike the other clauses of section 110, clause (4) applies only to performing rights in certain works and does not affect the exclusive right to display a work in public.

No profit motive.—In addition to the other conditions specified by the clause, the performance must be "without any purpose of direct or indirect commercial advantage." This provision expressly adopts the principle established by the court decisions construing the "for profit" limitation: that public performances given or sponsored in connection with any commercial or profit-making enterprises are subject to the exclusive rights of the copyright owner even though the public is not charged for seeing or hearing the performance.

No payment for performance.—An important condition for this exemption is that the performance be given "without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers." The basic purpose of this requirement is to prevent the free use of copyrighted material under the guise of charity where fees or percentages are paid to performers, promoters, producers, and the like. However, the exemption would not be lost if the performers, directors, or producers of the performance, instead of being paid directly "for the performance," are paid a salary for duties encompassing the performance. Examples are performances by a school orchestra conducted by a music teacher who receives an annual salary, or by a service band whose members and conductors perform as part of their assigned duties and who receive military pay. The committee believes that performances of this type should be exempt, assuming the other conditions in clause (4) are met, and has not adopted the suggestion that the word "salary" be added to the phrase referring to the "payment of any fee or other compensation."

Admission charge.—Assuming that the performance involves no profit motive and no one responsible for it gets paid a fee, it must still meet one of two alternative conditions to be exempt. As specified in subclauses (A) and (B) of section 110(4), these conditions are: (1) that no direct or indirect admission charge is made, or (2) that the net proceeds are "used exclusively for educational, religious, or charitable purposes and not for private financial gain."

Under the second of these conditions, a performance meeting the other conditions of clause (4) would be exempt even if an admission fee is charged, provided any amounts left "after deducting the reason-

able costs of producing the performance" are used solely for bona fide educational, religious, or charitable purposes. In connection with subclause (B), the committee was impressed by the argument that, if there is an admission charge, the copyright owner should have the right to decide whether and under what conditions his work should be performed, since otherwise he could be compelled to make an involuntary donation to the fund-raising activities of causes to which he is opposed. An amendment to the subclause would thus permit a copyright owner to prevent a public performance of his work under section 110(4)(B) by serving a notice stating his objections at least 7 days in advance.

Mere reception in public

Unlike the other clauses of section 110, clause (5) is not to any extent a counterpart of the "for profit" limitation of the present statute. It applies to performances and displays of all types of works, and its purpose is to exempt from copyright liability anyone who merely turns on, in a public place, an ordinary radio or television receiving apparatus of a kind commonly sold to members of the public for private use. The main effect of this exemption would be to allow the use of ordinary radios and television sets for the incidental entertainment of patrons in small business or professional establishments such as taverns, lunch counters, hairdressers, dry cleaners, doctors' offices, and the like. The clause has nothing to do with community antenna operations, and there is no intention to exempt performances in large commercial establishments, such as bus terminals, supermarkets, factories, or department stores, where broadcasts are transmitted to substantial audiences by means of loudspeakers covering a wide area. The exemption would also be denied in any case where the audience is charged directly to see or hear the transmission.

The basic rationale of this clause is that the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed. In the vast majority of these cases no royalties are collected today, and the committee believes that the exemption should be made explicit in the statute. Some fears have been expressed that technical improvements in a "single receiving apparatus of a kind commonly used in private homes" might some day lead to abuse of this exemption, but the committee does not feel that this remote possibility justifies making vast numbers of small business and professional people guilty of technical infringements.

SECTION 111. COMMUNITY ANTENNA SYSTEMS AND OTHER SECONDARY TRANSMISSIONS

The complex and economically important problem of community antenna transmissions is dealt with in section 111 of the bill. This section, which also deals with the operations of other secondary transmitters including nonprofit boosters and translators, passive common carriers, and relays to hotel rooms and the like, incorporates two clauses ((5) and (6)) of section 109 of H.R. 4347 as introduced. For the most part, however, it represents an entirely new provision.

In general, "community antenna systems" are commercial subscription services that pick up broadcasts of programs originated by others

and retransmit them to paying subscribers. A typical system consists of a central antenna which receives and amplifies television signals, and a network of cables through which the signals are transmitted to the receiving sets of individual subscribers. In addition to an initial installation charge, the subscribers pay a monthly service charge averaging about \$5 or \$6. The number of CATV systems in the United States has grown very rapidly since their introduction in 1950, and now totals between 1,500 and 2,000 systems with more than 2 million subscribers and annual revenue of over \$150 million.

The CATV industry had its beginnings in areas where mountainous terrain or other conditions make satisfactory television reception impossible without a special antenna. In recent years, in addition to providing better reception of local stations, community antenna systems have been moving into larger communities and offering their subscribers a choice of more programs by bringing in signals from distant cities. The increasing size and impact of community antenna operations have raised difficult problems of law and policy in both the copyright and the communications fields.

The 1965 bill would have imposed full liability upon community antenna transmissions, and at the 1965 hearings there was a great deal of testimony dealing with the treatment CATV operators should be given under the revised copyright law. The arguments on this question were sharply opposed: on the one side, the representatives of community antenna systems urged that their operations should be completely exempt unless they originate programming or act as a "pay-TV" system; while on the other side a number of interests, including authors, publishers, performing rights societies, motion picture producers, local broadcasters, broadcasting networks, and organized team sports, strongly supported the bill as introduced, which would have imposed full liability for unauthorized CATV use of copyrighted material.

The arguments of the community antenna industry on the basic issue of liability can be summarized as follows:

1. A CATV system merely provides its subscribers with a service for improving television reception. Copyright control would discriminate between those viewers who need no special equipment and those who do, and between those viewers who erect their own antennas and those who subscribe to a master antenna service.

2. The operator of a community antenna system has no control over the content of the programs its subscribers receive, and usually does not know what copyrighted works will be included in a program. Clearance plans are unworkable in this field, and even if blanket licenses were granted in all cases there is nothing to prevent certain interests from charging exorbitant fees and eventually assuming monopoly control over the CATV industry.

3. The royalties now being paid by broadcasters to copyright owners are based on the size of the entire audience a program reaches, including CATV subscribers. Community antenna operations thus benefit copyright owners and broadcasters by expanding their audience and hence their revenue, and to require payment of further royalties would constitute an unjustifiable double reward.

4. The 1965 bill conflicts with national television policy as reflected in the "compulsory carriage" rules of the Federal Communications Commission and in pending legislation requiring CATV systems to carry the signals of local broadcasters. If that bill were enacted the operator would be forced to choose between violating the copyright law, violating the FCC's rules, paying the copyright owner whatever he asks, or going out of business.

The following is a summary of the arguments presented by those opposing any exemption for community antenna operations:

1. Far from being a mere passive device for improving reception, CATV is a complex and sophisticated transmission system that does essentially what broadcasters do but charges for what broadcasters offer free.

2. By depriving copyright owners and their licensees of exclusivity within a particular area, community antenna systems drastically affect the market for a copyrighted work and the value of a copyright. The "double payment" argument is fallacious since, if the exclusivity of a market is lost, there is no payment to anyone. Local and "spot" advertisers will not pay for viewers outside the area normally reached by the broadcaster with whom they have bargained.

3. CATV systems are prosperous and proliferating, and neither need nor deserve a free ride at the expense of copyright owners, local broadcasters, and other users who must pay royalties. In many localities CATV operations are preventing the development of UHF broadcasting stations that would be copyright licensees.

4. Licensing arrangements in this field are entirely practical and would be worked out. The number of copyright owners is limited, and advance schedules are issued in plenty of time for negotiations to take place. The imposition of copyright liability on CATV systems would be highly unlikely to result in monopolistic practices since the networks own copyrights in less than 10 percent of their programming and any abuses could be dealt with under the antitrust laws; the anticompetitive impact that an exemption would have on copyright owners, local broadcasters, and local advertisers would be much more serious.

Before and during the 1965 hearings the three principal questions raised by the operations of community antenna systems—their legal liability under the present copyright law, the extent of their liability under the revised copyright statute, and the extent to which they should be regulated under the Federal communications laws—had proceeded along separate paths. Several events took place in 1966 which caused these paths to begin to converge:

1. On March 8, 1966, the Federal Communications Commission issued its second report and order asserting jurisdiction over community antenna systems and promulgating rules which, in general, compel CATV systems to carry the signals of all of the local television stations and to refrain from duplicating the programs of local stations on the same day. Subject to certain conditions and exceptions, the FCC rules also restrict CATV systems from entering the 100 largest television markets in the United States.

2. In March and April 1966, the House Committee on Interstate and Foreign Commerce, under the chairmanship of Representative Harley O. Staggers of West Virginia, held hearings on three bills (H.R. 12914, H.R. 13286, and H.R. 14201, 89th Cong. 2d sess.) dealing with the authority of the Federal Communications Commission to regulate the operation of CATV systems.

3. On May 5, 1966, Representative Kastenmeier, as acting chairman of the House Judiciary Subcommittee then considering the copyright law revision bill, addressed a letter to Chairman Staggers. It explained that the subcommittee had "reached agreement on certain amendments which would substantially change" the revision bill with respect to community antenna systems, and that because of the importance of this question and its relationship to the measures being considered by the Commerce Committee under the Communications Act, the subcommittee had decided to announce its conclusions. The letter, which summarized these conclusions and was accompanied by a new draft section on CATV, was printed in the Congressional Record on May 9, 1966.

4. On May 23, 1966, Judge William Herlands of the U.S. District Court for the Southern District of New York handed down his decision in *United Artists Television, Inc. v. Fortnightly Corp.*, 255 F. Supp. 177. In a long, detailed, and thoroughly documented opinion Judge Herlands held that the operations of community antenna systems constitute "public performance for profit" and are thus infringements under the present statute. This decision, the first to be handed down on the question in the United States, is presently under appeal. In reaching his conclusion as to the existing law, Judge Herlands noted that, although "exemptions from inclusion within the copyright proprietor's performance monopoly may arguably be desirable in certain instances purely on policy grounds, such desiderata are for Congress and not the courts," and cited Mr. Kastenmeier's letter of May 5.

5. On June 17, 1966, H.R.13286, a bill specifically authorizing regulation of community antenna systems by the Federal Communications Commission, was reported favorably by the House Committee on Interstate and Foreign Commerce (H. Rept. No. 1635, 89th Cong., 2d sess.).

6. In August 1966, the Senate Judiciary Subcommittee on Patents, Trademarks, and Copyrights held 3 days of hearings on S. 1006, the counterpart of H.R. 4347 as introduced. The testimony, which was all devoted to the problem of community antenna television operations, included proposals by representatives of the CATV industry for a compromise solution to the problem.

The committee revised its earlier proposals, as outlined in the letter of May 5, 1966, in light of these developments. The following is a summary of the provisions of section 111 of the present bill.

General approach of the section

After extensive consideration of the arguments made during and after the hearings, and of the issues involved, the committee concluded that there are no simple answers to the CATV problem. Neither the full liability sought by the copyright interests nor the complete ex-

emption sought by the community antenna interests would be appropriate or fair.

In the broadest possible terms, the committee's analysis of CATV operations divided them into three types: (1) operations constituting a mere "fill-in" or "master antenna" service; (2) operations that directly damage the copyright owner by destroying or impairing his market; and (3) operations that indirectly damage the copyright owner by using his work without compensation and by discouraging the establishment of local broadcasters who would be potential copyright licensees. The committee decided that each of these operations calls for different treatment: full exemption in the first case, full liability in the second, and limited liability in the third.

Section 111 must necessarily be a complex provision. This report will preface more detailed analysis with a simplified outline of its contents. Although the section deals with all types of secondary transmissions, as will be explained below, this outline is confined to the provisions affecting community antenna operations:

1. CATV operations wholly exempt: Where the CATV is merely a fill-in service to improve reception of subscribers who cannot get good reception from stations in their area because of mountains, buildings, or the like. An exception is provided that applies mainly to "metropolitan overlap" situations; for example, a CATV could be prevented from bringing a program on a Baltimore channel to subscribers in Washington if the program had already been sold exclusively to a Washington station and the CATV is given advance notice of the exclusive license.

2. CATV operations fully liable:

(a) Cases where CATV is no longer operating merely as CATV; for example, where it originates programs, alters program content, or operates as "pay-TV."

(b) Cases where CATV is importing signals into an area that already has full network coverage.

(c) Cases where CATV is importing a program from a distant station into an area where a station already has an exclusive license to show the same program and the CATV has received advance notice of the exclusive license.

3. CATV operations subject to limited liability: In general, a CATV system is liable for no more than a "reasonable license fee" where the area it serves does not receive all networks, unless the system has been given advance notice that a local station has an exclusive license to show the program in the area.

Throughout section 111 the operative terms are "primary transmission" and "secondary transmission." These terms are defined in section 111(d) entirely in relation to each other. In any particular case the "primary" transmitter is the one whose signals are being picked up and further transmitted by a "secondary" transmitter, who in turn is someone engaged in "the further transmitting of a primary transmission simultaneously with the primary transmission." For this purpose the "primary transmission" must be "made to the public," thus excluding private transmissions such as telephone conversations, space communications, closed circuit private telecasts, and private transmissions by computer. Under the scheme of the bill, a "primary" transmitter may be a "secondary" transmitter with respect

to someone whose signals he is picking up, and a "secondary" transmitter may be a "primary" transmitter with respect to someone else who is picking up his signals. The concept, which reflects the inter-relationship between two links in a chain of indeterminate length, is relevant only in section 111. All types of "transmission" are treated the same throughout the rest of the bill.

General exemptions

Mere relays to private hotel rooms, etc.—Three types of secondary transmissions are given a general exemption under clause (1) of section 111(a). The first of these applies to secondary transmissions consisting "entirely of relaying the primary transmission to the private rooms of a hotel or other public establishment," provided "no direct charge is made to the occupants" for the service. This exemption is a somewhat shortened version of section 109(6) of the 1965 bill, which was opposed by motion picture producers and performing rights societies, among others, on the ground that it might open the door to abuse. However, the committee believes that the mere act of relaying broadcasts to separate individuals in private rooms, without charge and without direct charge, warrants an exemption.

The exemption would not apply if the secondary transmission consists of anything other than the mere relay of public broadcasts; the cutting out of advertising or the running in of new commercials would subject the secondary transmitter to full liability. Moreover, the term "private rooms" is limited to rooms engaged by guests for their living quarters or for private parties, and does not include dining rooms, meeting halls, theaters, ballrooms, or similar places that are open to the general public or where "a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." No special exception is needed to make clear that the mere placing of an ordinary radio or television set in a private hotel room does not constitute an infringement.

Secondary transmissions of instructional broadcasts.—Subclause (B) of section 111(a)(1) is intended to make clear that an instructional transmission within the scope of section 110(2) is exempt whether it is a "primary transmission" or a "secondary transmission."

Common carriers.—The general exemption under section 111 extends to secondary transmitters that act solely as passive common carriers. Under subclause (C) of subsection (a)(1), a common carrier is exempt if it "has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission"; for this purpose its activities must "consist solely of providing wires, cables, or other communications channels for the use of others." Since community antenna systems necessarily select the primary transmissions to retransmit, and control the recipients of the secondary transmission, the exemption of this subclause would in no case apply to them.

Nonprofit secondary transmissions

Clause (2) of section 111(a), which is an amended version of section 109(5) of the 1965 bill, would exempt the activities of secondary transmitters that operate on a completely nonprofit basis. As under the 1965 bill, the operations of nonprofit "translators" or

“boosters,” which do nothing more than amplify broadcast signals and retransmit them to everyone in an area for free reception, would be exempt. However, the 1965 bill would have confined the exemption to cases where there was no charge to the recipients of the secondary transmission, thus ruling out cases where general community assessments or tax funds are used to support a cooperative or other nonprofit service. The committee found persuasive the argument that services of these kinds should be exempted as long as they are completely nonprofit and noncommercial. Under the revised clause, therefore, a secondary transmission is generally exempt if it is made by a “governmental body, or other nonprofit organization,” if there is no “purpose of direct or indirect commercial advantage,” and if there is no charge to the recipients “other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.”

All of the activities exempted by subsection (a) (2) are “subject to the provisions of subsection (b)” of section 111. This means, in very general terms, that the noncommercial secondary transmitter loses its exempt status if it engages in activities other than mere secondary transmission (that is, if it changes or originates programs, etc.); if it imports signals into an area that already has full network coverage; or if it imports a program after receiving notice that a broadcaster in the area has exclusive rights to it.

Secondary transmissions solely within primary transmitter's normal area

A key concept of section 111 is stated in subsection (a) (3): that a secondary transmission is exempt if it is “made for reception solely within the limits of the area normally encompassed by the primary transmission.” Under the definition added by the committee to section 101, the “area normally encompassed” by a transmission is the “entire geographic area within the radius that the transmitter’s signal is expected to reach effectively under normal conditions, including any parts of the area within that radius that its signal fails to reach effectively because of terrain, structures, or other physical or technical barriers.” As envisioned by the committee, a transmission’s normal area at the present time would generally be the equivalent of its “grade B contour” as defined in the regulations of the Federal Communications Commission. The definition in section 101 specifically empowers the Register of Copyrights to issue regulations that would “further particularize this definition, taking into account any pertinent definition in a Federal statute or regulation.”

The general intention behind section 111(a) (3) is that, where a CATV system is doing nothing but filling in gaps or improving reception within a normal service area, it is helping rather than hurting the copyright owner and should be exempt. For example, a CATV system having no subscribers beyond the Metropolitan New York City area would be exempt with respect to the New York City channels it carries. On the other hand, the exemption in clause (3) of subsection (a) is made “subject to the provisions of subsections (b) and (c)” of section 111. Thus, the CATV operator would be fully liable if it engages in program origination or other activities beyond mere secondary transmission, and would be subject to either full or limited liability if it has subscribers outside the “area normally encompassed” by

the primary transmitter, or if it imports outside signals that conflict with a local broadcaster's exclusive rights.

Certain secondary transmissions fully actionable

In the six cases enumerated in subsection (b) of section 111, the damage to the copyright owner is sufficiently substantial and direct to warrant the imposition of full liability for all of the remedies available under chapter 5 of the bill.

Alteration of program content.—The first clause of section 111(b) would make a CATV operator fully liable if it in any way alters "the content of the particular transmission program in which the performance or display is embodied." The new concept of a "transmission program," which also has significance elsewhere in section 111 and in section 112, was added by the committee in amending the 1965 bill. It is defined in section 101 as "a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit." Thus, alterations during any part of a "transmission program" (including the commercial advertising) would lose the secondary transmitter its exemption, even if it made no changes in the copyrighted work embodied in the program.

The rationale of this provision is that, since a broadcaster's advertising revenue, and hence the amount it is willing to pay to a copyright owner, is based on the number of people the advertiser's message reaches, any exemption or limitation on the liability of a CATV operator with respect to a particular program must depend on its carrying the advertising that accompanies the program. Any "changes, deletions, or additions during its secondary transmission" destroys the basis on which special treatment for CATV rests. This principle applies equally to "spot commercials" before and after the program, and clause (1) thus forbids changes with respect to "any separate commercial advertising or station announcements transmitted by the primary transmitter immediately before or after the transmission program."

Program origination.—The extent to which a secondary transmitter should be allowed to originate its own programs without loss of exemption presented a difficult issue. Copyright interests argued that a community antenna operator should not be permitted to build an audience of subscribers by using several of its channels to transmit copyrighted works for which it pays nothing or only a "reasonable license fee," and at the same time to use its other channels to originate programs that compete directly for audience and revenue. On the other hand, representatives of the CATV industry took the position that local public service programming is one of the unique values of a community antenna system to the subscribers in its area, and that a number of systems are already engaging in some program origination.

The committee believes that, with very limited exceptions, program origination by a community antenna system on any of its channels should make it fully liable with respect to the copyrighted material included in its secondary transmissions. However, under clause (2) a CATV operator would be permitted to originate "no more than two transmission programs at any one time" if they are "unaccompanied by any commercial or political advertising" and if they consist solely of one or more of the following: "weather, time, and news reports free from editorial comment; agricultural reports; religious services; and

local proceedings of governmental bodies." The thought here was that, if it wishes, the CATV could use one channel for continuous weather, time, and possibly news bulletins, and could use one other channel for periodic noncommercial programming of news reports without editorial comment and the other specified types of public service programs. Anything beyond this, if done "within one month before or after the particular secondary transmission," would lose the CATV operator its special status as a mere secondary transmitter.

Charges for particular transmissions.—A recurring theme in the arguments favoring full CATV liability has been the possibility that certain systems will use their exempt status and their existing body of subscribers to establish themselves as "pay-TV" systems. The committee believes that if a transmitter operates as a "pay-TV" service to any extent it should lose its special status as a secondary transmitter. Thus, under section 111(b)(3), full liability would be imposed if "the secondary transmitter, within one month before or after the particular secondary transmission, makes any separate, direct charge for any particular transmission it makes to those members of the public to whom it also makes the secondary transmission."

Transmissions not intended for general public.—The definition of "primary transmitter" in subsection (d) excludes purely private transmissions from the scope of section 111. There are, however, a number of primary transmissions that are to the "public" but are not capable of reception by the public at large. Examples include background music services such as Muzak, closed circuit broadcasts to theaters, pay-TV, and CATV itself. Clause (4) of section 111(b) makes clear that a community antenna system has no privilege of retransmitting a primary transmission that "is not made for reception by the public at large but is controlled and limited to reception by particular members of the public."

Recordation in Copyright Office.—There is at present no source of official information to which a copyright owner can go to find out the identity and ownership of CATV systems that are carrying the signals of primary transmitters he has licensed to use his works. Since section 111 would impose either full or limited liability for secondary transmissions reaching subscribers outside the primary transmitter's normal area, and since the extent of liability could depend upon whether an advance notice had been given by the copyright owner, a registry of CATV systems is established under section 111(b)(5)(A). This provision would impose full liability for a secondary transmission "made for reception wholly or partly outside the limits of the area normally encompassed by the primary transmission," if the secondary transmitter has not recorded in the Copyright Office "the identity and address of the person who owns the secondary transmission service or has power to exercise primary control over it" and also "the name and location of the primary transmitter" whose signals it is carrying. This information must be on record at least 1 month before the secondary transmission takes place, and must be recorded in accordance with regulations prescribed by the Register of Copyrights.

Secondary transmissions in adequately served areas.—Under section 111(b)(5)(B) of the present bill, a secondary transmitter would be fully liable if it imports a primary transmission embodying the copy-

righted work into an area that is "adequately served by transmitting facilities other than the primary transmitter." The concept of an "adequately served" area is defined in section 111(d)(3) as an area "normally encompassed by transmitting facilities that regularly transmit to the public at large a preponderance of the transmission programs regularly transmitted by each of the major broadcasting networks (or similar organizations) to transmitting facilities throughout the continental United States." The definition is intended to allow for changes in the structure and practices of broadcasting in the United States, but as of today it encompasses areas receiving more than half of the programs of each of the major networks.

Under this provision, for example, a CATV operator with subscribers in Chicago would be required to seek permission from the copyright owner before it could import the signals of a New York station embodying the copyrighted work. This would be true whether or not exclusive rights for the Chicago area have been sold, since in "adequately served" areas there is nearly certain to be an existing or potential market for exclusive rights in a copyrighted work. These areas are the "major markets" for both advertising and the licensing of copyrighted material, and if Chicago stations had to compete directly for viewers in Chicago with New York stations, the value of advertising and of copyright licenses would decrease. This is not justified in "adequately served" areas where the viewers and listeners are receiving substantially all of the network programming.

In this connection the committee considered a rather difficult question which is exemplified by the following case: A CATV operator with eight channels, and with subscribers only in New York City, transmits the signals of New York City stations on seven of its channels. It obtains a license from the owner of copyright in a series of programs that have been licensed for broadcast in Philadelphia but not in New York, and imports the signals of the Philadelphia station carrying the programs on its eighth channel. Should this destroy its exemption with respect to the other seven?

Under section 111(b)(5)(B) it is clear that a secondary transmission authorized by the copyright owner, even if made by retransmitting distant signals into an "adequately served" area, would not affect the CATV operator's liability with respect to other secondary transmissions. The committee concluded that this result is justifiable when the licensing arrangement is an ordinary arm's length transaction. On the other hand, if the CATV operator exercises any ownership or control over the distant station whose signals it is importing, or if it is involved in inducing the distant station to schedule the program, then its "secondary transmission" might be regarded as a kind of "back-door" origination running afoul of section 111(b)(2).

Notice of exclusivity.—Finally, under clause (6) of section 111(b), a CATV operator would be fully liable if it imports a program from a station into a particular area after receiving notice that a transmitter in the same area has the exclusive right to present the program there. Assume, for example, that the community antenna system has subscribers in an area served by one local station, and is bringing in four channels from a city 200 miles away; if a copyrighted motion picture has been exclusively licensed for showing on the local station,

the copyright owner can prevent the CATV from bringing a transmission of the work from the distant city by giving "written notice of such exclusive right to the secondary transmitter at least 10 days before the primary transmission." Full liability is justified here because of the importance of exclusivity in licensing the copyrighted work; whether the local station is willing to take a license, and what it is willing to pay, depend in large part on whether the copyright owner can guarantee exclusivity within the station's area of coverage.

There would be no need to apply clause (6) where signals are being imported into "adequately served" areas since full liability already attaches in such cases under clause (5). However, a secondary transmitter would be fully liable under clause (6) in all other cases, including those where he is importing distant signals into an area that is not "adequately served," and also those areas where there is an overlap between the signals of two different transmitters who are both authorized to carry a particular work. This "metropolitan overlap" situation would arise, for example, where a Baltimore station and a Washington station both have exclusive licenses to perform a copyrighted motion picture within their respective areas.

Although the subscribers of a CATV system operating in Washington would be within the "area normally encompassed" by the Baltimore station, the system could be prevented from carrying the Baltimore telecast of the motion picture if it received advance notice of the Washington station's exclusive rights.

Limited liability for certain secondary transmissions

In very general terms, section 111(c) establishes a limitation on liability—in effect a form of compulsory licensing—with respect to secondary transmissions that are neither exempt under subsection (a) nor fully liable under subsection (b). Limited liability would ordinarily apply in the following cases:

1. Where the secondary transmitter is operating in an area that does not receive full network coverage, and has not received advance notice of an exclusive license (either because there are no stations in the area, because none of them has an exclusive license, or because the copyright owner failed to give notice);

2. Where the secondary transmitter is operating in an area where there is overlapping between the normal coverage areas of two different stations, both of which are authorized to carry a particular program. If one of the stations has an exclusive license to carry the program but the secondary transmitter is given no advance notice, it is subject to limited liability if it brings the program to his subscribers from the other station.

Liability under section 111(c) would generally be "limited to recovery of a reasonable license fee, as found by the court under the circumstances of the case." However, in order to induce the parties to seek negotiated agreements and to bargain with each other in good faith, the subsection would authorize the court to increase or reduce the amount of recovery if it finds that either side failed to accept a reasonable offer. Under clause (2)(A), where the court finds that the infringer refused or failed to accept a written "offer of a license for a reasonable fee," it is required to award statutory damages of at least \$250, "but if three times the amount of a reasonable license fee exceeds \$250, then not less than \$250 or more than three times the

amount of a reasonable license fee, as the court considers just." In this situation it is also within the court's discretion to award costs and attorney's fees.

In the reverse situation, "where the court finds that the copyright owner has refused or failed to accept the written offer, accompanied by a tender, of a reasonable license fee," it has discretion to award costs and attorney's fees to the infringer, and may reduce or waive any award of damages.

In various discussions of compromise solutions to the CATV problem, proposals have been advanced for a compulsory licensing system based on payment of a fixed percentage of an operator's gross receipts rather than of a "reasonable license fee." Aside from the obvious difficulties of determining what the proper percentage would be and of allocating payments among an indefinite number of owners of copyrighted works of different types and values, it would be difficult to collect and distribute royalties equitably without establishing unacceptable Government controls or administration. The committee is opposed to any such system, and sees no need for it. It is to be hoped that negotiated agreements can be worked out without litigation; but, even if test cases are necessary, the appointment by the courts of experienced masters who can take account of prevailing license rates in analogous fields should provide guidelines as to what constitutes a "reasonable license fee" in particular situations.

SECTION 112. EPHEMERAL RECORDINGS

Section 112 of the amended bill concerns itself with a special problem that is not dealt with in the present statute but is the subject of provisions in a number of foreign statutes and in the 1948 Brussels revision of the Berne Convention. This is the problem of what are commonly called "ephemeral recordings": copies or phonorecords of a work made for purposes of later transmission by a broadcasting organization legally entitled to transmit the work. In other words, where a broadcaster has the privilege of performing or displaying a work either because he is licensed or because the performance or display is exempted under the statute, the question is whether he should be given the additional privilege of recording the performance or display to facilitate its transmission.

The need for a limited exemption in these cases because of the practical exigencies of broadcasting has been generally recognized, but the scope of the exemption has been a controversial issue. In the 1965 bill, section 112 (then section 110) recognized the privilege of a transmitting organization, whether commercial or educational, to make a single copy or phonorecord of any sort of work solely for its "own lawful transmissions or for archival preservation," provided that after 6 months the copy or phonorecord was either destroyed or preserved exclusively for archival purposes. Both commercial and educational broadcasters criticized the section as being too narrow, though for different reasons; copyright owners criticized various provisions of the section as being too broad.

In light of the many comments on this section at the hearings and thereafter, the committee concluded that its structure should be changed to accord special treatment to ephemeral recordings made for instructional broadcasting. It has therefore broken section 112 into

three subsections dealing generally with: (a) ephemeral recording privileges of organizations that have acquired a license to transmit the work; (b) ephemeral recording privileges of nonprofit organizations that are free to transmit the work under the instructional broadcasting exemption of section 110(2); and (c) the copyright status of works that come into being as the result of an ephemeral recording.

In general, the committee's amendments represent a liberalization of the ephemeral recording privilege. It should be emphasized, however, that the section is still firmly based upon the traditional concept of ephemeral recordings as mere technical adjuncts of broadcasting that have no appreciable effect on the copyright owner's rights or market for copies or phonorecords. As explained further in the following analysis of the section, the committee has not adopted changes that could convert the ephemeral recording privilege into a damaging inroad upon the exclusive rights of reproduction and distribution. On the other hand, the committee is aware of the practical problems facing educational broadcasters and other transmitters if they are required to seek separate clearances of performing and recording rights, and trusts that copyright owners will work out licensing arrangements covering these cases, under which performance and recording rights could be cleared at the same time.

Recordings for licensed transmissions

Under subsection (a) of section 112, an organization that has acquired the right to transmit any work (other than a motion picture or other audiovisual work), or that is free to transmit a sound recording under section 114, may make a single copy or phonorecord of a particular program embodying the work, if the copy or phonorecord is used solely for the organization's own transmissions within its own area; after 6 months it must be destroyed or preserved solely for archival purposes.

Organizations covered.—The ephemeral recording privilege is given by subsection (a) to "a transmitting organization entitled to transmit to the public a performance or display of a work." Assuming that the transmission meets the other conditions of the provision, it makes no difference what type of public transmission the organization is making: commercial radio and television broadcasts, educational broadcasts not exempted by section 110(2), pay-TV, closed circuit, background music, and so forth. However, to come within the scope of subsection (a), the organization must have the right to make the transmission "under a license or transfer of the copyright or under the limitations on exclusive rights in sound recordings specified by section 114(a)." Thus, except in the case of copyrighted sound recordings (which have no exclusive performing rights under the bill), the organization must be a transferee or licensee of performing rights in the work in order to make an ephemeral recording of it.

Some concern has been expressed by authors and publishers lest the term "organization" be construed to include a number of affiliated broadcasters who could exchange the recording without restrictions. The term is intended to cover a broadcasting network, or a local broadcaster or individual transmitter; but, under clauses (1) and (2) of the subsection, the ephemeral recording must be "retained and used solely by the transmitting organization that made it," and must be used solely for that organization's own transmissions within its own area. Thus,

an ephemeral recording made by one transmitter, whether it be a network or local broadcaster, could not be made available for use by any other transmitter.

Motion pictures and other audiovisual works.—Very strong criticism was leveled at the 1965 bill because it would have permitted the making of ephemeral recordings of all types of works, including motion pictures and other audiovisual works. The producers of these materials argued that bootlegging of illegal copies is already a serious problem, and that a provision allowing duplication by an indefinite number of transmitters and without permission from the copyright owner would greatly aggravate the situation. The committee concluded that the special nature of motion pictures and audiovisual works makes them exceptionally vulnerable to copyright impairment under an ephemeral recording exemption, and therefore removed them from the scope of section 112. If the transmitter needs the privilege of duplicating a motion picture or other audiovisual work for technical reasons, he can obtain it as a part of his performing license from the copyright owner.

Scope of the privilege.—Subsection (a) permits the transmitting organization to make “no more than one copy or phonorecord of a particular transmission program embodying the performance or display.” As noted above in connection with section 111, a “transmission program” is defined in section 101 as a body of material produced for the sole purpose of transmission as a unit. Thus, under section 112(a), a transmitter could make only one copy or phonorecord of a particular “transmission program” containing a copyrighted work, but would not be limited as to the number of times the work itself could be duplicated as part of other “transmission programs.”

Three specific limitations on the scope of the ephemeral recording privilege are set out in subsection (a), and unless all are met the making of an “ephemeral recording” becomes fully actionable as an infringement. The first requires that the copy or phonorecord be “retained and used solely by the transmitting organization that made it,” and that “no further copies or phonorecords are reproduced from it.” This means that a transmitting organization would have no privilege of exchanging ephemeral recordings with other transmitters or of allowing them to duplicate their own ephemeral recordings from the copy or phonorecord it has made. There is nothing in the provision to prevent a transmitting organization from having an ephemeral recording made by means of facilities other than its own, although it would not be permissible for someone other than a transmitting organization to make a recording on his own initiative for possible sale or lease to a broadcaster. The ephemeral recording privilege would extend to copies or phonorecords made in advance for later broadcast, as well as recordings of a program that are made while it is being transmitted and are intended for deferred transmission or preservation.

Clause (2) of section 112(a) provides that, to be exempt from copyright, the copy or phonorecord must be “used solely for the transmitting organization’s own transmissions within the area normally encompassed by its transmissions or for purposes of archival preservation or security.” The “area normally encompassed” is defined in section 101, and its meaning is discussed above in connection with section 111. In the context of section 112 it means that, although a transmitter may use an ephemeral recording as many times as it

wishes within the time limits specified in clause (3), its use must be confined to the organization's own transmissions within the radius that its signal "is expected to reach effectively under normal conditions."

Under the 1965 bill, an ephemeral recording could have been used for transmissions for "six months from the date it was first made," and would then have been required either to be destroyed or to be preserved solely for archival purposes. Authors and publishers argued that 6 months is too long for this purpose, while broadcasters argued for a longer period. In amending the section the committee adopted a longer period of use for ephemeral recordings used in instructional broadcasting, as explained below in connection with section 112(b); it retained the 6-month period in subsection (a) but, consistent with another change in subsection (b), provided for it to run "from the date the transmission program was first transmitted to the public."

Recordings for instructional transmissions

Section 112(b) represents a response to the arguments of educational broadcasters and other educational groups for special recording privileges, although it does not go as far as these groups requested. In general, it permits a nonprofit organization that is free to transmit a work under the instructional broadcasting exemption of section 110(2) to make two copies or phonorecords under certain circumstances, to exchange one of the copies or phonorecords with other instructional transmitters, and to use the ephemeral recording for transmitting purposes for a year after the initial transmission. Subsection (b) parallels subsection (a) in various respects, and the points on which they coincide will not be discussed again here.

Organizations covered.—The privilege of making ephemeral recordings under section 112(b) extends to "a governmental body or other nonprofit organization entitled to transmit a performance or display of a work under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a)." Aside from phonorecords of copyrighted sound recordings, the ephemeral recordings made by an instructional broadcaster under subsection (b) must embody a performance or display that meets all of the qualifications for exemption under section 110(2). Copies or phonorecords made for educational broadcasts of a general cultural nature, or for transmission as part of an information storage and retrieval system, would not be exempted from copyright protection under section 112(b).

Motion pictures and other audiovisual works.—Since the performance exemption provided by section 110(2) applies only to non-dramatic literary and musical works, there was no need to exclude motion pictures and other audiovisual works explicitly from the scope of section 112(b). Another point stressed by the producers of educational films in this connection, however, was that ephemeral recordings made by instructional broadcasters are in fact audiovisual works that often compete for exactly the same market. They argued that it is unfair to allow instructional broadcasters to reproduce multiple copies of films and tapes, and to exchange them with other broadcasters, without paying any copyright royalties, thereby directly injuring the market of producers of audiovisual works who now pay substantial fees to authors for the same uses. The committee found these arguments persuasive and, while it has broadened the ephemeral

recording privilege in the case of instructional transmissions, has placed what it considers reasonable limits on its scope.

Scope of the privilege.—Under subsection (b) an instructional broadcaster may make “no more than two copies or phonorecords of a particular transmission program embodying the performance or display.” No further copies or phonorecords can be reproduced from those made under section 112(b), either by the nonprofit organization that made them or by anyone else. Unlike ephemeral recordings made under subsection (a), however, exchanges of recordings among instructional broadcasters are permitted. An organization that has made copies or phonorecords under subsection (b) may use one of them for purposes of its own transmissions that are exempted by section 110(2), and it may also transfer it to other instructional broadcasters for use in the same way. Only one copy or phonorecord may be used for transmission; where two have been reproduced, one must be “used solely for purposes of archival preservation or security.”

As in the case of ephemeral recordings made under section 112(a), a copy or phonorecord made for instructional broadcasting could be reused in any number of transmissions within the time limits specified in the provision. However, an important limitation on the scope of the privilege is derived from subclause (B) of section 110(2), which provides that, as a condition of the exemption, the “radius of the area normally encompassed by the transmission” must be “no more than 100 miles.” Thus, the ephemeral recording privilege of section 112(b) would not apply to instructional transmissions covering a very wide geographic area, such as those relayed by a broadcasting network or communications satellite.

Because of the special problems of instructional broadcasters resulting from the scheduling of courses and the need to prerecord well in advance of transmission, the period of use has been extended to one year from the date the transmission program was first transmitted to the public.

Copyright status of ephemeral recordings

A program reproduced in an ephemeral recording made under either subsection (a) or subsection (b) of section 112 in many cases will constitute a motion picture, a sound recording, or some other kind of derivative work, and will thus be potentially copyrightable under section 103. Representatives of copyright owners, including authors, publishers, and producers of audiovisual works, argued that it would not be fair to allow someone who uses copyrighted material without permission to secure copyright in the resulting derivative work, and thus to claim exclusive rights in the product of his free use of another person’s work. The committee regarded this point as well taken: ephemeral recordings are not to be copyrightable as derivative works except with the consent of the owners of the copyrighted material employed in them. The principle is expressed in section 112(c), using language parallel to that in section 115(a)(2).

SECTION 113. REPRODUCTION OF PICTORIAL, GRAPHIC, AND SCULPTURAL WORKS IN USEFUL ARTICLES

Section 113 deals with a problem that attracted much attention in the past but elicited only incidental comment during the hearings: the

extent of copyright protection in "works of applied art." The section takes as its starting point the Supreme Court's decision in *Mazer v. Stein*, 347 U.S. 201 (1954), and the first sentence of subsection (a) restates the basic principle established by that decision. The rule of *Mazer*, as affirmed by the bill, is that copyright in a pictorial, graphic, or sculptural work will not be affected if the work is employed as the design of a useful article, and will afford protection to the copyright owner against the unauthorized reproduction of his work in useful as well as nonuseful articles. The term "useful article" is defined in section 113(b) as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." This is the same as the language used in the design bills introduced in the 1st session of the 89th Congress (H.R. 450, H.R. 3366, and S. 1237) and in the present Congress (H.R. 2886, H.R. 3542, and H.R. 6124).

The broad language of section 106(1) and of the first sentence of section 113 raises questions as to the extent of copyright protection for a pictorial, graphic, or sculptural work that portrays, depicts, or represents an image of a useful article in such a way that the utilitarian nature of the article can be seen. To take the example usually cited, would copyright in a drawing or model of an automobile give the artist the exclusive right to make automobiles of the same design?

The 1961 Report of the Register of Copyrights stated, on the basis of judicial precedent, that "copyright in a pictorial, graphic, or sculptural work, portraying a useful article as such, does not extend to the manufacture of the useful article itself," and recommended specifically that "the distinctions drawn in this area by existing court decisions" not be altered by the statute. The Register's Supplementary Report, at page 48, cited a number of these decisions, and explained the insuperable difficulty of finding "any statutory formulation that would express the distinction satisfactorily." The committee adopts the Register's conclusion that "the real need is to make clear that there is no intention to change the present law with respect to the scope of protection in a work portraying a useful article as such." It has therefore made no changes in section 113(a)(1), which states that proposition directly.

Clause (2) of section 113(a), which aroused no opposition during the hearings, is intended to clear up an uncertainty under the present law. Under the provision it would not be an infringement, where a copyrighted work has been lawfully published as the design of useful articles, to make, distribute or display pictures of the articles in advertising, in feature stories about the articles, or in news reports.

SECTION 114. SOUND RECORDINGS

As explained above in connection with section 102, the bill recognizes sound recordings as copyrightable works in themselves, and protects them against unauthorized duplication and the distribution of phonorecords duplicated without authority. Section 114 makes clear, however, that the owner of copyright in a sound recording is not given an exclusive right of public performance or rights against mere imitation of his recording without capturing the same sounds.

The provisions of section 114(a), limiting the exclusive rights in a sound recording to those specified by clauses (1) and (3) of section

106 and excluding "any right of performance under section 106(4)," proved to be controversial. As a practical matter, the question is whether radio and television broadcasters, community antenna systems, jukebox operators, background music services, and others who use phonorecords for public performances should have to pay royalties to the owner of copyright in the sound recording itself, as well as to the owner of copyright in the musical or literary work embodied in the recording.

At the hearings representatives of the American Federation of Musicians opposed the 1965 bill because of its failure to give performers an exclusive right in the public performance of sound recordings embodying their performance. They argued that performing musicians now suffer economic deprivation because of competing performances from their own records, and that the bill discriminates against them by denying exclusive rights under the statute while abolishing any vestige of protection under the common law. They asserted that opposition to the principle of a performing right in sound recordings is limited to competing economic interests who either do not want to share in remuneration from performances or do not want to have to pay any more than they do now. Their position was that this represents a "sharp moral issue" which some other countries have resolved in the performers' favor, and they proposed an amendment establishing a special performing right that would endure for 10 years and would be subject to compulsory licensing.

While the position of record producers on this question appeared somewhat more qualified, individual representatives of the industry spoke strongly in favor of recognizing full rights of public performance in sound recordings. They condemned the 1965 bill as inequitable in denying public performance rights to record producers who, they argued, are responsible for the most creative and valuable elements of sound recordings today. They recommended recognition of full performing rights in sound recordings, with ownership being divided between the record producer and the various performers involved.

Although there was little direct response to these arguments, it was apparent that any serious effort to amend the bill to recognize even a qualified right of public performance in sound recordings would be met with concerted opposition. The committee believes that the bill, in recognizing rights against the unauthorized duplication of sound recordings but in denying rights of public performance, represents the present thinking of other groups on that subject in the United States, and that further expansion of the scope of protection for sound recordings is impracticable. This conclusion in no way disparages the creativity and value of the contributions of performers and record producers to sound recordings, or forecloses the possibility of a full consideration of the question by a future Congress.

Subsections (b) of section 114 makes clear that statutory protection for sound recordings extends only to the particular sounds of which the recording consists, and would not prevent a separate recording of another performance in which those sounds are imitated. Thus, infringement takes place whenever the actual sounds that go to make up a copyrighted sound recording are reproduced in phonorecords by repressing, transcribing, recapturing off the air, or any other method. Mere imitation of a recorded performance would not constitute a

copyright infringement even where one performer deliberately sets out to simulate another's performance as exactly as possible.

Section 114(c) state explicitly that nothing in the provisions of section 114 should be construed to "limit or impair the exclusive right to perform publicly, by means of a phonorecord, any of the works specified by section 106(4)." This principle is already implicit in the bill, but it is restated to avoid the danger of confusion between rights in a sound recording and rights in the musical composition or other work embodied in the recording.

SECTION 115. COMPULSORY LICENSE FOR PHONORECORDS

The provisions of section 1(e) and 101(e) of the present law, establishing a system of compulsory licensing for the making and distribution of phonorecords of copyrighted music, are retained with a number of modifications and clarifications in section 115 of the bill. Under these provisions, which represented a compromise of the most controversial issue in the 1909 act, a musical composition that has been reproduced in phonorecords with the permission of the copyright owner may generally be reproduced in phonorecords by anyone else if he notifies the copyright owner and pays a specified royalty.

As explained at pages 53 to 54 of the Register's Supplementary Report, the fundamental question of whether to retain the compulsory license or to do away with it altogether was a major issue during earlier stages of the program for general revision of the copyright law. At the hearings it was apparent that the argument on this point had shifted, and the real issue was not whether to retain the compulsory license but how much the royalty rate under it should be. Nevertheless, before considering the details of the compulsory licensing system, the committee considered the arguments for and against retaining the system itself.

On this question the record producers argued vigorously that the compulsory license system must be retained. They asserted that the record industry is a half-billion-dollar business of great economic importance in the United States and throughout the world; records today are the principal means of disseminating music, and this creates special problems, since performers need unhampered access to musical material on nondiscriminatory terms. Historically, the record producers pointed out, there were no recording rights before 1909 and the 1909 statute adopted the compulsory license as a deliberate anti-monopoly condition on the grant of these rights. They argued that the result has been an outpouring of recorded music, with the public being given lower prices, improved quality, and a greater choice. The position of the record producers is that the compulsory license has avoided antitrust problems that have plagued the performing rights field, and for the same reasons has been adopted (and recently retained) in a number of foreign countries. They maintained that the dangers of monopolies and discriminatory practices still exist, and repeal would result in a great upheaval of the record industry with no benefit to the public.

The counterargument of the music publishers was that compulsory licensing is no longer needed to meet the special antitrust problems existing in 1909, and that there is no reason why music, alone of all copyrighted works, should be subject to this restriction. They main-

tained that music publishing is not a public utility, and that the establishment of a statutory fee for a product wholly produced and distributed within the private sector of our economy is a strange incongruity. Their basic position was that they would much prefer outright repeal, but if, in the face of the record industry's opposition, the compulsory license must be retained, they would be willing to accept a compromise as long as the copyright owner's situation is improved.

The conclusion that the committee drew from these arguments, and from the array of economic data presented to it in connection with the rate, was that a compulsory licensing system is still warranted as a condition for the rights of reproducing and distributing phonorecords of copyrighted music. The committee also concluded, however, that the present system is unfair and unnecessarily burdensome on copyright owners, and that the present statutory rate is too low. How the compulsory license should be changed in operation, and particularly what the maximum royalty rate should be, were the issues that occupied most of the committee's time in considering section 115. Its conclusions on these questions are discussed in the following analysis of the section as it appears in the present bill.

Availability and scope of compulsory license

Subsection (a) of section 115 deals with three doubtful questions under the present law: (1) the nature of the original recording that will make the work available to others for recording under a compulsory license; (2) the nature of the sound recordings that can be made under a compulsory license; and (3) the extent to which someone acting under a compulsory license can depart from the work as written or recorded without violating the copyright owner's right to make an "arrangement" or other derivative work. The first two of these questions are answered in clause (1) of section 115(a), and the third is the subject of clause (2).

The present law, through not altogether clear, apparently bases compulsory licensing on the making or licensing of the first recording, even if no authorized records are distributed to the public. The first sentence of section 115(a) (1) would change the basis for compulsory licensing to authorized public distribution of phonorecords (including disks and audio tapes but not the sound tracks or other sound records accompanying a motion picture or other audiovisual work). Under the clause, a compulsory license would be available to anyone as soon as "phonorecords of a nondramatic musical work have been distributed to the public under the authority of the copyright owner."

The second sentence of clause (1), which has been the subject of some debate, provides that "a person may obtain a compulsory license only if his primary purpose in making phonorecords is to distribute them to the public for private use." This provision was criticized as being discriminatory against background music systems, since it would prevent a background music producer from making recordings without the express consent of the copyright owner; it was argued that this could put the producer at a great competitive disadvantage with performing rights societies, allow discrimination, and destroy or prevent entry of businesses. The committee concluded, however, that the purpose of the compulsory license does not extend to manufacturers of phonorecords that are intended primarily for commercial use, in-

cluding not only broadcasters and jukebox operators but also background music services. On the other hand, the committee did not adopt the suggestion to amend the provision so that the compulsory license would be available only where the "primary purpose in making the particular phonorecords is to distribute them to the public for private home use." Use of the word "particular" would mean that the making of some phonorecords for public performance would constitute infringement even if the bulk of the phonorecords was made for the "primary" purpose of ordinary distribution to the public; this is not the committee's intention. Similarly, use of the word "home" might be construed to rule out tapes made for private use in automobiles, and the committee intends for the compulsory license to be available in such cases.

The second clause of subsection (a) is intended to recognize the practical need for a limited privilege to make arrangements of music being used under a compulsory license, but without allowing the music to be perverted, distorted, or travestied. Clause (2) permits arrangements of a work "to the extent necessary to conform it to the style or manner of interpretation of the performance involved," so long as it does not "change the basic melody or fundamental character of the work." The provision also prohibits the compulsory licensee from claiming an independent copyright in his arrangement as a "derivative work" without the express consent of the copyright owner.

Procedure for obtaining compulsory license

Section 115(b) (1) requires anyone who wishes to take advantage of the compulsory licensing provisions to serve a "notice of intention to obtain a compulsory license," which is much like the "notice of intention to use" required by the present law. Under section 115, the notice must be served before any phonorecords are distributed, but service can take place "before or within 30 days after making" any phonorecords. The notice is to be served on the copyright owner, but if the owner is not identified in the Copyright Office records, "it shall be sufficient to file the notice of intention in the Copyright Office."

Clause (2) of section 115(b) is a part of the committee's amendments of the 1965 bill with respect to public performance of music on coin-operated machines, discussed below in connection with section 116. Under the clause a compulsory licensee must, if requested within 10 days after he has served his notice of intention, designate the name of the copyright owner or his agent "on a label or container accompanying each phonorecord of the work distributed by him."

Under the present law, a record manufacturer who fails to serve a "notice of intention to use" is liable to the copyright owner merely for the statutory royalty of 2 cents per record, plus an award of not more than 6 cents per record as damages. The limitation on liability has been strongly criticized as inadequate either to compensate the copyright owner or to deter infringement. Clause (3) of section 115(b) would remove any limitation on liability in this situation by providing that "failure to serve or file the notice required by clause (1) * * * forecloses the possibility of a compulsory license and, in the absence of a negotiated license, renders the making and distribution of phonorecords actionable as acts of infringement under section 501

and fully subject to the remedies provided by sections 502 through 506." The same consequences follow from failure "to designate the name of the owner or agent as required by clause (2)." The remedies provided in section 501 are those applicable to infringements generally.

Royalty payable under compulsory license

Identification of copyright owner.—Under the present law a copyright owner is obliged to file a "notice of use" in the Copyright Office, stating that the initial recording of the copyrighted work has been made or licensed, in order to recover against an unauthorized record manufacturer. This requirement has resulted in a technical loss of rights in some cases, and serves little or no purpose where the registration and assignment records of the Copyright Office already show the facts of ownership. Section 115(c)(1) therefore drops any formal "notice of use" requirements and merely provides that "to be entitled to receive royalties under a compulsory license, the copyright owner must be identified in the registration or other public records of the Copyright Office." On the other hand, the committee regards proper identification as an important precondition of recovery, and has adopted the further provision that "the owner is entitled to royalties for phonorecords made after he is so identified but he is not entitled to recover for any phonorecords previously made."

Basis of royalty.—Under the present statute the specified royalty is payable "on each such part manufactured," regardless of how many "parts" (i.e., records) are sold. This basis for calculating the royalty has been retained in section 115(c)(2), which provides that "the royalty under a compulsory license shall be payable for every phonorecord made in accordance with the license."

The record producers were strongly critical of this provision, arguing that it is unjustified to require a compulsory licensee to pay license fees on records which merely go into inventory, which may later be destroyed, and from which the manufacturer gains no economic benefit. They argued that the royalty basis should be records "made and distributed," which is the principle reflected in general practice with respect to negotiated licenses under the law today. However, the committee believes that, unless a negotiated agreement provides otherwise, the liability for royalties should be fixed at the time phonorecords are made under a compulsory license. A record maker should not be free to reproduce as many phonorecords as he wishes without any permission from or obligation to the copyright owner, and then to pay a royalty only with respect to the phonorecords he eventually distributes to the public.

Rate of royalty.—A large preponderance of the extensive testimony presented to the committee on section 115 (section 113 in the 1965 bill) was devoted to the question of whether the statutory royalty rate should be left at 2 cents per composition per phonorecord or whether it should be raised to 3 cents as provided by the 1965 bill. After devoting many hours to this question, the committee amended the 1965 bill to set the fee at 2½ cents.

The following is a summary of the economic arguments presented during and after the hearings, and of the committee's analysis of them, showing the basis for the royalty rate finally adopted.

1. *The need for an increase by music publishers.*—One of the astounding things about the present copyright law is that a flat maximum fee of 2 cents per phonorecord, established as part of a com-

promise during the beginnings of the record industry, has remained unchanged through the economic and technological vicissitudes of nearly 58 years.

Since 2 cents in 1909 is worth well over 6 cents today, and in view of current inflationary trends, the copyright owners urged that the injustice of the present 2-cent ceiling is self-evident. They also argued that in 1909 music publishers were well established and record companies were in their infancy, and that their relative bargaining positions today are reversed: they characterized the record industry as a giant with a dominating position, while the music publishers may face extinction unless their bargaining power is improved. The copyright owners stressed that music publishers perform a vital creative function, which is necessary for the record manufacturers and which entails substantial expenses in developing, promoting, and exploiting particular songs.

In contradiction, the record producers presented statistics aimed at showing that an increase in the statutory fee from 2 to 3 cents would be inequitable. They argued that inflationary trends since 1909 are meaningless when viewed in light of the tremendous increase in the volume of records sold, the great decrease in record prices, the introduction of longplaying records containing 12 selections (with a statutory royalty for each), and the millions of dollars received by copyright owners from broadcasts of records. They asserted that, unlike the music publisher who gets income from many sources, including public performances made possible by records, the record producer derives profits solely from his sale of records, whose value and creative character is largely the result of his efforts and expenditures rather than those of the music publisher. They claimed, on the basis of statistical tables, that copyright owners receive substantially greater financial gains from the phonorecord industry than the performing talent, or the supporting talent, or the record companies themselves; that copyright owners are now being paid a far greater total sum than ever before; and that they are also receiving a far greater percentage of the industry's sales dollar than in 1909. On this last point, the record producers argued that the 1909 statute was designed to give copyright owners about 5 percent of the manufacturer's wholesale selling price, while the share today is around 15 percent.

2. *Potential impact of increase on record industry.*—Much of the statistical data presented by the record producers at the hearings was in support of the argument that a 1-cent increase in the rate would have a grave impact on the entire record industry, including manufacturers, artists, performing talent, distributors, retailers, and even copyright holders. According to their interpretation of the figures, the total increase in annual dollar payments to copyright owners would be several times the size of the profits in recent years of the record companies, whose profits are already squeezed to the minimum and who cannot absorb such an increase. They asserted that, unless the sale prices of records were to be raised considerably, the higher royalty would generate irresistible pressures tending to force out many companies, especially smaller ones, and similar pressures would operate on wholesalers and retailers. Ultimately, they argued, the level of activity in the industry and the number of new recordings would be seriously depressed, and strong forces would be unleashed to restructure the industry, impairing competition and leading to concentration

of control. They maintained that some 80 percent of all releases in 1964 lost money (although copyright owners still received their royalties on them), and that net profit of record companies in that year amounted to only 3.8 percent; in contrast, between 1955 and 1964 the percentage of the record sales dollar payable to copyright holders increased from 8 percent to 11.1 percent.

In reply, the copyright owners pointed out that profit figures can be misleading in an industry where major record companies are units (divisions, subsidiaries, or affiliates) of large diversified corporations operating in the entertainment field, and where interownership between record producers and broadcasters, film makers, music publishers, and recording artists is common. They claimed, moreover, that all major record companies, and at least 90 percent of all record companies, have their own distributing units, including "record clubs," so that many transactions are intracompany with total profits going to the same organization. The music publishers strongly criticized the figures presented by record producers on the ground that, to support the conclusion that copyright owners derive more from record sales than record companies, the effect had been to compare gross revenue of copyright owners with record companies' net profits. The record companies challenged the music publishers to present comparative profit figures. This the publishers declined to do on the ground that, because the two industries differ in nature, comparative statistics would be meaningless unless clearly understood criteria were first established for collecting and presenting both sets of figures. The music publishers did explain at length, however, the various elements that go to make up their costs.

3. *Potential impact of increase on consuming public.*—On the basis of the situation existing at the time of the hearings, the record producers predicted an increased price to consumers of 20 cents per \$3.98 longplaying record, or a total of possibly \$30 million per year, if the statutory rate were raised to 3 cents. This prediction assumed that the record manufacturer could not absorb any of the 12-cent increase on a record containing 12 selections, and that record marketers in turn would have to pass the increase on down the line to the consumer, with each distributor adding an increment to his price because of his added costs and risks. Moreover, the record producers forecast that the variety of musical offerings would be restricted; that the quality of musical offerings would deteriorate; that composers, especially unknowns, would find fewer opportunities for having their works recorded; that record manufacturers would have to avoid risks on new and unusual compositions, reduce the number and length of selections, record fewer serious works, and rely more on the public domain for popular material.

In response to these predictions the copyright owners argued that the process of economic life precludes any meaningful prophecies concerning possible increases in consumer prices. They asserted that an increase is by no means certain, and that it is equally possible for some or all of the added input price to be absorbed or to result in more selectivity in production. Citing the record industry's own statement, they pointed out that at present 74 percent of single records, 61 percent of popular longplaying records, and 87 percent of classical records fail to earn a profit; raising the rate to 3 cents would raise

the percentages of these unprofitable releases only slightly: 2 percent for singles, 3 percent for popular LP's, and from 1 to 3 percent for classical LP's. The increase would, according to the copyright owners, provide authors with an added incentive to write and would, if it had any effect at all, be likely to increase competition.

4. *The statutory fee as a ceiling or as an established rate.*—One of the principal arguments of the copyright owners was that, in contrast to record manufacturers whose prices are not fixed and who are not obliged to pay copyright owners any minimum amount, the authors and publishers are deprived of any right to bargain above the 2-cent ceiling. They stressed that the statutory rate is merely a maximum: the record manufacturer can always negotiate for less, but the copyright owner can never ask for more. They contended that the vast majority of records are made under written agreements with the rate, below 2 cents, varying according to the bargaining position of the parties; nearly all agreements are based on records sold rather than made; record club sales are at three-fourths of the contract rate, and nothing is paid for records distributed "free" under various sales and promotional plans. Moreover, a survey of royalty payments made during the second quarter of 1965 by 3 of the largest record companies, to the 6 publishing companies receiving the largest payment from each of the record companies (13 publishing companies in all), showed that out of the 31,600,000 phonorecords covered, some 35 percent paid a royalty of 2 cents, while 65 percent paid less; in money actually paid, just under half of the fees were at 2 cents. According to the copyright owners, these figures demonstrate that the statutory rate is an absolute and effective ceiling, with substantial variations below it; if the ceiling is raised there would be more room for negotiation, but it would not mean that all license fees would immediately rise to 3 cents.

On the other side, the record producers argued that as a practical matter the statutory rate establishes the fee actually paid in most instances, and that for business reasons it is impossible for individual companies to bargain for special discriminatory rates for particular compositions. They cited a survey of some 1,400 selections issued by two major record companies during randomly selected months in 1964 and 1965, which found that some 73 percent of all copyright licenses (as distinguished from phonorecords sold) were at the 2-cent rate, and that of the remaining 27 percent the vast majority represented regular, stereotyped variations below the standard of 2 cents. When challenged as to the size of this sample, the record producers responded by alleging that, by extrapolation, the sample of 1,400 "selections" represents roughly 41 million phonorecords sold, and that since no one knows how many records will be sold when a license is signed, the relevant figure is the number of licenses at 2 cents rather than the number of license fees paid at 2 cents. Their basic position on this point is that a 1-cent increase would simply establish a higher prevailing rate rather than providing more "room for negotiation."

After a thoroughgoing review of all these arguments and the statistics presented in support of them, the committee concludes:

1. Though it would be surprising if exactly the same amount found appropriate for the statutory royalty in 1909 were found still to be appropriate in 1966, this result is not impossible. The sharp decrease in the value of money in the past half century has undoubtedly been counteracted to a significant extent by the drop

in the per composition cost of records and the much greater sales volumes involved. On the other hand, the committee is not prepared to say, even on the basis of the record industry's own figures, that no increase is justified. Other factors must be considered including the fact that, whatever figure is arrived at, it will constitute a fixed maximum enacted during a period of serious inflationary pressures.

2. The record producers have effectively supported their argument that, as of the time of the hearings, an increase of 1 cent in all copyright royalties actually paid could have had a substantial adverse impact on the industry. At least in some cases relatively high risks and small profit margins could force companies to pass the increase on to consumers, and could set up pressures that would result in some business failures and restructuring within the industry. On the other hand, these factors would have to be weighed against the unfairness to copyright owners in preventing bargaining above a fixed maximum amount.

3. The record industry's report was written before enactment, on June 21, 1965, of Public Law 89-44, which completely and immediately eliminated the 10 percent Federal manufacturers' excise tax on phonograph records. Assuming, as the report did, that the excise tax on a \$3.98 list price record was 18 cents, it appears that manufacturers have now raised their prices to distributors for popular longplaying records by about 9 cents (one-half of the tax reduction, according to a September 1965 report of the U.S. Council of Economic Advisers). Federal excise taxes for 1964 were more than \$25 million; if unit sales remained the same and manufacturers kept half the tax, their net sales figures would increase by at least \$12.5 million. In addition: (1) elimination of the tax also eliminated the substantial costs of paperwork connected with it; (2) record marketers also have generally taken advantage of some of the tax deduction rather than passing it on to consumers, since discount prices have changed relatively little; and (3) unit sales increased substantially in 1965. (A front page story in *Billboard* for June 4, 1966 is headed "Retail Disk Sales Up 14 percent; Alltime High," and states: "Aided by a booming economy and the removal of the Federal excise tax, record sales last year hit a national alltime high of \$789 million at retail, with gains reported in every category of merchandising outlet.")

4. In the significant debate over whether the statutory fee is a ceiling or a rate there appears to be some validity to the arguments on both sides. The fee is certainly a ceiling in the sense that no higher amounts are ever paid, but the record producers may well be right in asserting that the statutory fee establishes a base, with stereotyped variations downward, that for practical business reasons is used as the rate in most written agreements. In this sense there may be relatively few "negotiated" agreements; but this does not necessarily mean that, if the statutory maximum were increased somewhat, the prevailing fee structure would immediately be increased to the maximum without negotiations.

5. The competing statistical studies of existing license rates indicate that, although three-fourths of the licenses call for a royalty of 2 cents per record sold, two-thirds of all royalty pay-

ments, and one-half of the dollar amounts paid, are for less than 2 cents. There is no reason to assume that these substantial deviations below the maximum would change if the statutory rate were increased; if they did, it would not be because of statutory compulsion but because of pressure from market values and bargaining power. The committee is setting a statutory rate at the high end of a range within which the parties can negotiate, now and in the future, for actual payment of a rate that reflects market values at that time, but one that is not so high as to make it economically impractical for record producers to invoke the compulsory license if negotiations fail.

6. Applying these principles to the specific issue facing it, the committee concluded that the present 2-cent rate is too low and that the proposed 3-cent rate is too high. In adopting a rate halfway between the two, the committee does not suggest that 2½ cents should necessarily constitute the prevailing rate now or in the future. The half cent increase is intended merely to widen the copyright owner's bargaining range without destroying the value of compulsory licensing to record producers.

The 1965 bill provided for an alternative rate based on the playing time of the composition on the record; the statutory royalty was to be "either 3 cents, or 1 cent per minute of playing time or fraction thereof, whichever amount is larger." The present statute lacks a rate based on playing time, and the record producers expressed no opposition to remedying this omission. They did, however, oppose the 1-cent per minute rate as a 300 percent increase over the one-quarter cent per minute rate that has been voluntarily incorporated into negotiated licenses under the present law. They argued that, since many popular compositions run for more than 3 minutes, the proposal would have a substantial impact both in increasing the fee and in artificially shortening recorded performances.

Under the record industry's proposal for an alternate rate of one-fourth cent per minute of playing time, a composition would have to run 10 minutes before the copyright owner could collect more than the standard 2½ cents. The committee regards this as too long, and has adopted the half cent per minute rate as a reasonable compromise. Under the present bill a composition running up to 5 minutes would carry the standard rate, with a half cent added for each minute, or fraction, over 5.

Accounting and payment of royalties; effect of default.—The remaining provisions of section 115(c) attracted little attention at the hearings. Under clause (3), consistent with present practice under negotiated licenses, statements of account and royalty payments are to be made on a quarterly basis. The copyright owner may demand that the statements of account be certified by a certified public accountant, and the committee has amended the clause to give the Register of Copyrights authority to provide regulations governing the information to be included in them.

A source of criticism with respect to the compulsory licensing provisions of the present statute has been the rather ineffective sanctions against default by compulsory licensees. Clause (4) of section 115(c) corrects this defect by permitting the copyright owner to serve written notice on a defaulting licensee, and by providing for termination of the compulsory license if the default is not remedied within 30 days after

notice is given. Termination under this clause "renders the making and distribution of all phonorecords, for which the royalty had not been paid, actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506."

SECTION 116. PERFORMANCES ON COIN-OPERATED PHONORECORD PLAYERS

General background of the problem

No provision of the present law has attracted more heated denunciations and controversy than the so-called jukebox exemption of section 1(e). This paragraph, which has remained unchanged since its enactment in 1909, provides that—

The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs.

This blanket exemption has been widely and vigorously condemned as an anachronistic "historical accident" and in terms such as "unconscionable," "indefensible," "totally unjustified," and "grossly discriminatory."

Efforts to repeal the clause have been going on for more than 40 years, and between 1947 and 1965 there had been some 25 days of congressional hearings devoted to the subject. On September 10, 1963, this committee favorably reported a bill (H.R. 7194) aimed at eliminating the blanket exemption (H. Rept. No. 733, 88th Cong., 1st sess.) but it failed to reach the floor of Congress. This bill was reintroduced in the 89th Congress (H.R. 18, H.R. 2793, and H.R. 15004) and its substance was also incorporated in section 114 of H.R. 4347 as introduced in 1965. In effect, that section would have imposed full liability for copyright infringement upon the operators of coin-operated phonographs, but would have absolved the proprietors of establishments where jukeboxes are located from liability under certain circumstances.

Although the tone and the points emphasized may be said to have changed somewhat, the abundant testimony on the jukebox problem at the 1965 hearings contained basically the same arguments as those advanced at earlier hearings. A wide range of interests and organizations testified or were cited as favoring outright repeal of the exemption: authors of all types of works (including songwriters), performing rights societies, music publishers, book publishers, the Copyright Office, the American Bar Association, the American Patent Law Association, the Association of the Bar of the City of New York, the National Federation of Music Clubs, the General Federation of Women's Clubs, the Rockefeller Brothers Fund, and the National Council on the Arts. The basic arguments against retaining an exemption for the public performance of music on coin-operated machines can be summarized as follows:

1. The exemption for coin-operated machines was added to the 1909 act at the last moment, and its consequences were completely unforeseen. The coin-operated music player of today is not comparable to the player pianos and "penny parlor" mechanisms in use in 1909, and the unanticipated effect of the provision, creating a blanket exemption for a large industry that is based on use of copyrighted material, represents the "core defect" in the present law.

2. The exemption not only deprives copyright owners of revenue to which they are fairly entitled, but it also discriminates against all other commercial users who must pay in order to perform copyrighted music. In the past 30 years the jukebox industry has become strong and prosperous by taking a free ride on the hits created and developed by authors and publishers. Jukebox operators, alone in the entertainment field, continue to use others' property for profit without payment.

3. The exemption also creates serious international problems. It is obviously unfair for U.S. composers to be paid when their songs are used in jukeboxes abroad, but for foreign composers to be deprived of revenue from jukebox uses of their compositions in this country. The problem is particularly acute with respect to Canada. Jukebox royalties in foreign countries average between \$40 and \$50 per machine annually.

4. It is difficult to find support for the argument that jukebox operators cannot afford to pay for use of the very property they must have in order to exist: copyrighted music. Revenues from jukebox performances gross approximately \$500 million annually, of which the copyright owners receive nothing. Just before the hearings started a large jukebox manufacturer announced that it was inaugurating its own scheme for licensing music at \$60 a box per year; if operators can pay this manufacturer for music that includes few if any hits, why cannot they pay for other music?

5. If the exemption is repealed, the performing rights societies would make every effort to work out reasonable licensing arrangements at fees comparable to those being charged other music users. The fees would not be exorbitant and could be subject to compulsory arbitration or court review.

The following summarizes the principal arguments made by jukebox operators and manufacturers for retaining the present exemption:

1. The exemption in section 1(e) was not an accident or anomaly, but a carefully conceived compromise. Congress in 1909 realized that the new royalties coming to copyright owners from mechanical sound reproductions of their works would be so substantial that in some cases fees for performances resulting from the use of mechanical reproductions would not be justified. Automatic phonographs were widely known and used in 1909.

2. The present law does not discriminate in favor of jukebox operators, but removal of the exemption would discriminate against them: jukebox performances are really forms of incidental entertainment like relays to hotel rooms or turning on a radio in a barber shop, and should be completely exempted like them. The industry buys more than 50 million records per year which, under the present mechanical royalty of 2 cents per composition or 4 cents per record, means that jukebox operators are indirectly paying copyright owners over \$2 million a year now and would be paying them more under any increased mechanical royalty in the bill. No one has shown why this is not ample. Moreover, jukeboxes use hit records rather than hit compositions, and the composition is usually not the most important factor in the success of a record; jukeboxes represent an effective plugging

medium that promotes record sales and hence mechanical royalties.

3. Outright repeal of the exemption without any limitation on the amount of the fee could bring depression and economic disaster to the jukebox industry and could wipe out more than one-fourth of the present locations. The operation of coin-operated phonographs is a declining business, since revenues have not increased in the past 10 or 15 years but profit margins have dwindled as the result of added costs.

4. The greatest concern of the jukebox operators is with the "open end" aspect of outright repeal, allowing performing rights societies to charge any amount they choose, coupled with the danger of unlimited liability for statutory damages faced by the operator unless he pays whatever is asked. The jukebox operators are small businessmen who could not negotiate with the huge performing rights societies on anything like equal terms.

Alternative proposals for a solution

Even though the arguments at the hearings were presented dialectically in support of completely opposite conclusions, it was apparent that neither outright repeal nor unqualified retention of the jukebox exemption was the only possible solution to the problem. Following the hearings various alternative proposals were put forward, both by the interests affected and within the committee itself, and were given thoroughgoing consideration. The following is a summary of the most important of these proposals and of the arguments for and against them.

Compulsory arbitration.—Under an alternative proposal advanced on behalf of authors and copyright owners, no statutory damages would be recoverable in an infringement action against a jukebox operator unless the copyright owner had offered to submit the rate and other conditions of a licensing agreement to compulsory arbitration or the equivalent. The arguments advanced for this proposal were that it would preserve the "free negotiation" system of copyright licensing prevalent today but, by allowing price fixing by a dispassionate third party, would give some assurance of reasonable performance fees without establishment of a statutory schedule of rates or a Government regulatory agency. On the other hand, the jukebox operators argued that the plan would still leave them in a disadvantageous position: even if arbitration were not offered the operator would still be liable for profits, actual damages, and an injunction; individual operators would have to accept the results of arbitration in an industry negotiation since they do not have the money or bargaining power to carry on individual negotiations; and there is no limit on the number of copyright owners with whom the operator would have to negotiate.

Compulsory license with per-box maximum.—H.R. 5174, a bill on which this committee held hearings during the 88th Congress, would have repealed the jukebox exemption but would have excused a jukebox operator from further liability if he paid a specified annual sum (\$5) into a fund from which distributions could be made to copyright owners. At first glance this plan would seem to offer the simplest kind of compulsory licensing in the jukebox field, since it would establish a uniform rate, would permit the operator to make

a single payment without making separate accountings, and might avoid some policing of individual boxes by copyright owners. However, the plan was opposed by both sides at the 1963 hearings, and on examination it proved to have serious drawbacks. It would have required centralized payment which, under a statutory scheme, would necessarily require a Government body either to collect the money or to establish and regulate a quasi-governmental collecting agency. Even more serious, the proposal would have been virtually unworkable because it would have required disbursement among various copyright owners or agents, on the basis of a factual finding of relative numbers of performances, which would have required extensive and costly hearings, surveys, reports, appeals, and litigation. Costs of administration would eat up the receipts unless the fee were quite high, the funds collected would be tied up until final adjudication of every claim, and private negotiations could be effectively prevented.

Compulsory license involving fixation of stamps.—The committee also discussed a system under which copyright owners would sell an operator a block of stamps which he would affix to his records of songs owned by that proprietor, thus freeing them from performing royalties for stated periods of time. This plan would have advantages in avoiding Government collection or extensive regulation and accounting. A major practical flaw is that records or their labels frequently cannot be seen when they are in a machine. Other arguments against the proposal are that operation of the plan would be costly, that stamps could easily be forged, that operators and location owners would object to necessary inspections, that records and stamps could readily be transferred without any possibility of control, and that future jukeboxes may use tapes or other media to which visible stamps could not be affixed.

Compulsory licensing with fixed fee per record purchased.—Under a detailed proposal advanced on behalf of jukebox operators by the Music Operators of America, an operator would be freed from liability if he registers his machines annually in the Copyright Office, posts a certificate on each machine, and pays quarterly a statutory fee of 2 cents per composition on all records acquired during the quarter for use on the machine; failure to comply would result in full liability. This plan has the advantages of avoiding Government collection and regulation; purchase of records could be said to have some relation to performances, and the proposals for registration of machines, accounting, and full liability for failure to comply would strengthen the possibility of enforcement. On the other hand, the proposal was vigorously opposed by a group representing performing rights societies, songwriter organizations, and music publisher organizations, who argued that, as written, the plan is based on the wrong principle, since the purchase of records bears no relation to the number of performances; a large percentage of records in a jukebox are seldom if ever played, and the payment of a single fee overlooks the fact that a record may be performed many times or indefinitely. Since there would be no way of checking record purchases, the copyright owner group argued that the plan would amount to an "honor system," and that the 2 cent fee would not pay for the necessary policing.

Compulsory licensing with fixed fee per record in box.—In the light of the foregoing proposals, the committee developed for consideration

an alternative plan, based on the system recommended by the jukebox operators but with changes to meet the principal objections of the copyright owners. In its essentials, this plan would require the jukebox operator to register his machine annually with a list of the compositions available for performance in it during the preceding year, to post a certificate on the machine, and to pay quarterly royalties at a fixed statutory amount, with an accounting based on the records in the box during that quarter. To receive payment the copyright owner would have to be identified on the record; if not identified he would have to make a special claim. This plan, which could be said to represent a compulsory license based on "inventory" rather than "purchase," forms the basis for section 116 of the present bill.

Conclusions reached by the committee

The public performance of music on coin-operated phonorecord players is a key issue in copyright law revision, and the committee devoted a great deal of time and effort to studying it in all of its aspects and without any fixed preconceptions. The committee's basic conclusions can be summarized as follows:

1. The present blanket jukebox exemption should not be continued. Whatever justification existed for it in 1909 exists no longer, and one class of commercial users of music should not be completely absolved from liability when none of the others enjoys any exemption.

2. Performances on coin-operated phonorecord players should be subject to a compulsory license (that is, automatic clearance) with statutory fees. Unlike other commercial music users, who have been subject to full copyright liability from the beginning and have made the necessary economic and business adjustments over a period of time, the whole structure of the jukebox industry has been based on the existence of the copyright exemption. Merely withdrawing the exemption might, as they fear, place the operators in a position that would be unjustifiably weak with respect to bargaining and unnecessarily perilous with respect to liability.

3. The appropriate solution is not to be found in the proposals for compulsory arbitration or a fixed per box fee. The former offers insufficient safeguards to jukebox operators and the latter would be administratively unworkable.

4. The most appropriate basis for the compulsory license is to be found in the phonorecords actually available for performance in a machine during a particular period of time. The suggested stamp plan would create difficulties of administration and enforcement. The plan based on records purchased offers insufficient safeguards to the copyright owner.

After reaching these conclusions the committee prepared a draft provision incorporating them and sought comments from representatives of the interests most directly affected. Meetings were held which, although no definite agreements were reached, helped the committee in its final evaluations of the substantive and procedural content of the provision. The following is a summary of section 116 of the bill as now reported.

Limitations on exclusive right

The compulsory licensing provisions in section 116 have been patterned after those in section 115, although there are differences. One difference occurs in the first subsection: section 116(a) not only provides "the operator of the coin-operated phonorecord player" with the opportunity of obtaining "a compulsory license to perform the work publicly on that phonorecord player," but also exempts entirely under certain conditions "the proprietor of the establishment in which the public performance takes place." As provided by clause (1), the proprietor is not liable for infringement unless he is also "the operator of the phonorecord player" or unless he refuses or fails to disclose the operator's identity upon request.

This exemption of the so-called location owner appeared in earlier jukebox bills, and was adopted by the committee as a reasonable balancing of equities. However, the committee did not adopt the further suggestion that an operator who owns no more than three machines should be exempted. As defined in section 116(e) (2), an "operator" is anyone who, alone or jointly: (1) owns a coin-operated phonorecord player; (2) "has the power to make the * * * player available for placement in an establishment for purposes of public performance"; or (3) "has the power to exercise primary control over the selection of the musical works made available for public performance" in the machine. Several different persons may be "operators" of the same coin-operated phonorecord player under this definition, but they would not include the "location owner" in the ordinary case where he merely provides a place for the machine to be used.

In contrast to the present statute, which merely refers to a "coin-operated machine," section 116(e) (1) of the bill contains a detailed definition of "coin-operated phonorecord player." Under the definition a machine or device would be considered a "coin-operated phonorecord player" only if it meets all of five specified conditions:

1. It must be used for no purpose other than the "performance of nondramatic musical works by means of phonorecords" and, in order to perform that function, it must be "activated by the insertion of a coin." The definition would thus exclude coin-operated radio and television sets, as well as devices similar to jukeboxes that perform musical motion pictures.

2. The establishment where the machine is located must make "no direct or indirect charge for admission." This requirement, which has its counterpart in section 1(e) of the present law, would exclude establishments making cover or minimum charges, and those "clubs" open to the public but requiring "membership fees" for admission.

3. The machine must be "incapable of transmitting the performance beyond the establishment in which it is located." This condition would permit the amplification of a jukebox performance throughout the various rooms of a restaurant, for example. However, since another requirement of the definition is that the choice of works to be performed is to be made by the patrons, the likelihood of abuse of this privilege to provide music in a large establishment seems remote.

4. The phonorecord player must be "accompanied by a list of the titles of all the musical works available for performance on it,"

and the list must either be affixed to the machine itself or "posted in the establishment in a prominent position where it can be readily examined by the public." This condition would not be satisfied if the list is available only on request.

5. Finally, the machine must provide "a choice of works available for performance," and must allow "the choice to be made by the patrons of the establishment in which it is located." Thus, a machine that merely provides continuous music without affording any choice as to the specific composition to be played at a particular time, or a case where selections are made by someone other than patrons of the establishment, would be outside the scope of the definition.

Method for obtaining compulsory license

In general, a jukebox operator who has not negotiated licenses with the owners of copyright (or their agents) in the compositions publicly performed on his machines could obtain a compulsory license by: (1) recordation of the phonorecord player in the Copyright Office at specified intervals; (2) posting a certificate of the recordation on the box; (3) filing a statement in the Copyright Office listing the compositions performed during the preceding year that were not covered by a negotiated license; and (4) making quarterly statements of account and royalty payments to copyright owners who are identified on phonorecords performed without a negotiated license. Subsection (b) of section 116 deals with the first three of these requirements.

Under section 116(b)(1)(A), an operator who wishes to take advantage of the compulsory licensing provisions must first record in the Copyright Office a statement giving his name and address, identifying the machine and its capacity, and stating the name and address of the establishment where it is located. This must be done with respect to each machine subject to compulsory licensing, and must be done "before or within 1 month after" any copyrighted music is made available for performance "in a particular establishment." In other words, under the compulsory license, the operator must register a jukebox each time he places it in an establishment, but he is given a grace period of 1 month before he becomes fully liable for infringement. Thereafter, in January of "each succeeding year" he must again register the machine, this time accompanying it with a list of "all the musical works made available in the phonorecord player for performance during each of the calendar quarters of the preceding year." Where the operator has negotiated a license with the copyright owner or his agent, however, the list need not include any compositions covered by the license.

Under subclause (B) of section 116(b)(1), the operator is required to keep affixed to the machine a Copyright Office certificate "of the latest recordation made by him * * * with respect to that phonorecord player." The certificate must be affixed to the machine itself, "in a position where it can be readily examined by the public." Clause (2) of section 116(b) makes the operator fully liable as an infringer, subject to both the civil remedies and criminal penalties of chapter 5 of the bill, if he fails to record the statements or to affix the certificate required by subsection (b). On the other hand, if the operator has negotiated licenses with the owners of copyright in all of the music performed on his jukeboxes, he need not comply with any of the specified procedures.

Notice as to royalty payments

An essential part of the compulsory licensing system adopted by the committee is the procedure under which the jukebox operator would be given notice of the person to whom to pay royalties with respect to each copyrighted work he performs. This procedure is established by clause (1) of section 116(c), which requires that a copyright owner comply with one or the other of two conditions in order to receive jukebox royalties under the compulsory license.

The first of these alternative conditions, as specified in subclause (A), is that the copyright owner or his agent shall have required his name to appear on "a label or container accompanying the phonorecords" of the song for which royalties are due, and that his address is on record in the Copyright Office. As noted above, a new provision has been added to section 115(b) empowering the copyright owner to require this information to appear on labels or containers accompanying phonorecords made under a compulsory license. It is the committee's understanding that most record labels today contain the name of the performing rights society to which performance royalties are to be paid.

The second alternative would cover the case where the name of the owner or agent has been omitted from the label or container. There, as provided by subclause (B) of section 116(c) (1), the jukebox operator would not be obliged to seek out the proper person to receive royalties. Instead the copyright owner or agent would be required to assert, within stated time limits, "a written claim specifying all of the works for which royalties are payable to him by the operator for any three-month period."

Amount of royalty

Having adopted the system of compulsory licensing it regards as best calculated to achieve the purposes of copyright law revision, the committee considered at some length the economic question of how high the statutory royalty rate should be. Statistics in this field are elusive, but on the basis of the testimony at the hearings and other relevant data it appears that at present there are between 450,000 and 500,000 jukeboxes in the United States. There are probably between 7,000 and 9,000 operators handling jukeboxes (and usually other coin-operated amusement and vending machines). The average operator has between 60 and 75 jukeboxes and grosses roughly \$1,000 per year (between \$18 and \$18.50 per week) per box. His operating expenses include State and local taxes and fees, averaging about \$25 per box per year (a Federal tax on jukeboxes of \$10 per year was repealed as of July 1, 1965). He must pay the location owner a commission, usually 50 percent but sometimes 40 percent, based on actual or adjusted gross receipts, and his other expenses include records, depreciation, servicing, and salaries. As a very rough average, a jukebox operator makes a net annual profit of \$100 on his capital investment in each machine, after deducting his own salary, those of his employees, the location owner's commission, and all other expenses.

Jukebox operators buy approximately 54 million records a year, the vast majority being single records containing two selections each. The figures on total record sales vary greatly from source to source, but on the basis of figures submitted to the committee by the Record

Industry Association of America, jukebox purchases would account for 21 percent of the total number of records sold, 39 percent of the single records sold, 6 percent of total selections on records, and 6 percent of the total dollar volume of records sold. Jukebox purchases per box average about 115 records or 230 selections per year.

On the basis of these figures it can be concluded that, although the operation of jukeboxes is generally a small business, the industry can absorb the imposition of a reasonable copyright royalty, commensurate with what other commercial music users are paying. Comparative figures cited by the performing rights societies included widely variable jukebox rates in foreign countries, ranging from \$18 to \$90 a box per year with an average around \$50. A closer comparison is offered by the amounts now paid by background music services, which apparently pay one performing rights society a minimum of between \$20 and \$30 per year per subscriber. Another guideline offered at the hearings was a proposal by the National Licensed Beverage Association to establish maximum annual per-box amounts for a 5-year period in accordance with a sliding scale: jukeboxes 5 years old or older would pay \$15, jukeboxes with 100 plays would pay \$20, those with 160 plays would pay \$25, and those with 200 plays and over would pay \$30.

The proposal advanced by the Music Operators of America (2 cents per song on records purchased) would have amounted to only \$2,160,000 (\$4.60 per box) in gross revenues to copyright owners. The committee regarded this figure as substantially too low but, under the compulsory licensing system embodied in section 116, it was unwilling to go as high as other figures that were suggested. Assuming an average of 160 plays per box and a total of 480,000 boxes in the United States, a quarterly fee of 3 cents per composition would produce annual royalties of \$19.20 per box or \$9,216,000 per year. The committee adopted a basic quarterly royalty rate of 3 cents as representing an amount that would be fair to both copyright owners and jukebox operators.

Clause (2) of section 116(c) makes clear that, as in the case of any of the other requirements of the statutory compulsory license, the parties can set the royalty at any amount in a negotiated agreement. Under the compulsory license, the royalty "for any one work" is payable "for each three-month period or fraction thereof that the work has been available for performance on the particular phonorecord player." The amount of the royalty is set out in the alternative: it is either 3 cents, or a prorated amount of less than 3 cents based on box capacity and the total number of songs available for performance during the quarter.

Under the first alternative, for example, a jukebox that was filled to its capacity of 100 selections and that had no turnover during a quarter would pay a straight royalty of 3 cents to the owners of copyright in each composition in the box, or a total of \$3. Assume, however, that there was a turnover, and that a total of 120 selections were made available during the quarter. A straight 3-cent royalty would require a total payment of \$3.60. The committee was concerned that this result might discourage turnover of records in jukeboxes, and therefore established a lower alternative royalty: "a prorated amount calculated by first multiplying 3 cents by the capacity of the phono-

record player * * * and then dividing * * * by the total number of works actually made available." Thus, where a 100-selection box contained 120 compositions during a quarter, the total royalty would still be \$3 (100 times 3 cents) and the royalty per composition would be 2½ cents (\$3 divided by 120).

The second alternative has been subject to criticism both because it is somewhat complex and because it might encourage some operators to "stuff the box" with compositions in the public domain or controlled by their own organization. However, the committee decided to leave it as a part of the statutory fee structure of the bill. If future experience under the compulsory licensing provisions of section 116 shows that the alternative has become a source of subterfuge and abuse, it would, of course, be necessary for Congress to consider revising it.

Method and basis of payment

Where the copyright owner or agent is identified as provided by clause (1) (A) of section 116(c), the jukebox operator is required under clause (3) of that subsection to make royalty payments to him at specified quarterly intervals. These must be accompanied by a detailed statement of account setting forth all of the works made available for performance during the quarter and not covered by a negotiated license. Where the operator is presented with a valid claim under section 116(c) (1) (B), he is required to make payment within 4 months. Failure to comply with these requirements makes the operator fully liable as an infringer and subject to all of the remedies provided by chapter 5 of the bill. False representations and other activities amounting to fraud or misrepresentation in connection with a compulsory license are made subject to criminal penalties by section 116(d).

Section 116(c) (6) establishes a conclusive presumption that, for purposes of section 116, "every musical work whose title appears on the list" accompanying the jukebox during any part of a quarter was "publicly performed at least once during that period by means of the phonorecord player which the list accompanies." Thus, where a copyright owner brings suit for infringement against a jukebox operator who has neither a negotiated nor a compulsory license, he need only prove that the copyrighted work in suit was listed as available for performance in the jukebox; he is not required to prove that an actual performance took place.

SECTION 201. OWNERSHIP OF COPYRIGHT

Initial ownership

Two basic and well-established principles of copyright law are restated in section 201(a): that the source of copyright ownership is the author of the work, and that, in the case of a "joint work," the coauthors of the work are likewise coowners of the copyright. Under the definition in section 101, a work is "joint" if the authors collaborated with each other, or if each of the authors prepared his contribution with the knowledge and intention that it would be merged with the contributions of other authors as "inseparable or interdependent parts of a unitary whole." The touchstone here is intention, at the time the writing is done, that the parts be absorbed or combined

into an integrated unit, although the parts themselves may be either "inseparable" (as in the case of a novel or painting) or "interdependent" (as in the case of a motion picture, opera, or the words and music of a song). The definition of "joint work" is to be contrasted with the definition of "collective work," also in section 101, in which the elements of merger and unity are lacking: there the key elements are assemblage or gathering of "separate and independent works * * * into a collective whole."

The definition of "joint works" has prompted some concern on the part of motion picture producers lest it be construed as converting the authors of previously written works, such as plays, novels, and music, into coauthors of a motion picture in which their work is incorporated. It is true that a motion picture would normally be a joint rather than a collective work with respect to those authors (including screenwriters, directors, actors, cameramen, sound engineers, and so forth) who actually work on the film, although their usual status as employees for hire would keep the question of coownership from coming up. On the other hand, although a novelist, playwright, or songwriter may write with the hope or expectation that his work will be used in a motion picture, this is clearly a case of separate or independent authorship rather than one where the basic intention behind the writing of the work was for motion picture use. In this case, the motion picture is a derivative work within the definition of that term, and section 103 makes plain that copyright in a derivative work is independent of, and does not enlarge the scope of rights in, any preexisting material incorporated in it. There is thus no need to spell this conclusion out in the definition of "joint work."

There is also no need for a specific statutory provision concerning the rights and duties of the coowners of a work; courtmade law on this point is left undisturbed. Under the bill, as under the present law, coowners of a copyright would be treated generally as tenants in common, with each coowner having an independent right to use or license the use of a work, subject to a duty of accounting to the other coowners for any profits.

Works made for hire

Section 201(b) of the bill adopts one of the basic principles of the present law: that in the case of works made for hire the employer is considered the author of the work, and is regarded as the initial owner of copyright unless there has been an agreement otherwise. The committee has also accepted a proposal, advanced by various author and publisher organizations and concurred in by representatives of motion picture producers, that any agreement under which the employee is to own rights should be in writing and signed by the parties, and has amended the subsection accordingly.

The development of the work-made-for-hire provisions of the 1965 bill is reviewed in detail at pages 66-68 of the Register's Supplementary Report, which accurately summarizes them as "a carefully worked out compromise aimed at balancing legitimate interests on both sides." At the hearings, however, witnesses representing screenwriters and composers for motion pictures urged that section 201(b) be amended to recognize employees as authors and copyright owners under certain circumstances. They argued that those who write for motion pictures have no choice but to write for hire, and that their poor bargain-

ing position is made worse by the blanket provision of section 201 (b) giving all rights of authorship and ownership to the producers. They proposed the recognition of something similar to the "shop right" doctrine of patent law: with some exceptions, the employer would acquire the right to use the employee's work to the extent needed for purposes of his regular business, but the employee would retain all other rights as long as he refrained from authorizing competing uses. This proposal was opposed by the motion picture producers as unjustified and as endangering a basic compromise underlying the whole bill; they argued that, unlike producers, motion picture writers are insulated from loss, and that they have already achieved substantial ownership rights and shares of producers' revenues under collective-bargaining agreements.

After weighing these opposing arguments the committee decided not to substitute a shop right doctrine for the employer-as-author concept of the present law. While the change might theoretically improve the bargaining position of screenwriters and others as a group, the practical benefits that individual authors would receive are highly conjectural. The presumption that initial ownership rights vest in the employer for hire is well established in American copyright law, and the arguments for it are fairly summarized in the Supplementary Report of the Register. To exchange it for the uncertainties of the shop right doctrine would not only be of dubious value to employers and employees alike, but might also reopen a number of other issues and produce dissension.

The status of works prepared on special order or commission has been a continuing issue in the development of the definition of "work made for hire" in section 101. The basic position of book publishers and certain other groups on this issue has been that, while some commissioned works concededly should not be regarded as made for hire, there are others to which all of the factors calling for special treatment of works made for hire apply with full force. They argued that, in the case of a wide range of works such as maps, illustrations, prefaces, introductions, indexes, textbooks, translations, contributions to dictionaries, directories, encyclopedias, motion pictures, and the like, the distinction between "employment" or "commission" is fundamentally meaningless, since in either case the work is prepared at the employer's initiative and risk and under his direction. Part, though not all, of the publishers' concern on this point arose from the right of individual authors, in the case of works not made for hire, to terminate their assignments under section 203.

Although the authors, for their part, appeared willing to concede that in certain special cases the distinction between works made for hire or on commission is a purely technical one, they were strongly opposed to any broad provision that would convert a commissioned work into a "work made for hire" upon the author's written agreement. They stressed the poor bargaining position of most authors and argued that the statute should not permit ordinary book publication contracts, which are frequently made before the work is finished, to be routinely turned into employment contracts by the addition of one clause.

The problem here is how to draw a statutory line between those works written on special order or commission that should be considered as "works made for hire," and those that should not. The 1965 bill moved in the direction of a solution in its definition of

“work made for hire”: in addition to works “prepared by an employee within the scope of his employment,” the definition provided for special cases (contributions to collective works and motion pictures, translations, and supplementary works) that would be considered “works made for hire” if the parties agreed to this result in writing. The 1965 bill contained a separate definition, with examples, of a “supplementary work”: “a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work.”

After introduction of H.R. 4347 a number of representatives of author and publisher organizations succeeded in reaching a compromise that was presented at the hearings. In effect, this compromise was aimed at adding additional categories to the four types of commissioned works dealt with specially in the definition of works made for hire, and at somewhat broadening (or at least clarifying) the correlative definition of “supplementary work.”

After full consideration the committee decided to incorporate the substance and much of the language of this compromise in the bill. In addition to the four classes originally listed in H.R. 4347, the commissioned works to be accorded special treatment include “a compilation,” “an instructional text,” “a test,” and “an atlas.” The committee wishes to make clear that the agreement referred to in the definition must not only be in writing but must also be signed by the parties.

The definition of “supplementary work,” which has now been made a part of the definition of “work made for hire,” has been broadened to cover material prepared for purposes of “concluding” and “revising” another author’s work, and the examples have been amplified to include “afterwords,” “musical arrangements,” and “answer material for tests.”

One of the most important substantive changes in the definition involves the incorporation of “instructional texts” among the categories of commissioned works that can be considered “works made for hire” upon agreement of the parties. This new term is given its own definition in the present bill: “a literary, pictorial, or graphic work prepared for publication with the purpose of use in systematic instructional activities.” The concept is intended to include what might loosely be called “textbook material,” whether or not in book form or prepared in the form of text matter. The basic characteristic of “instructional texts” is the purpose of their preparation for “use in systematic instructional activities,” and they are to be distinguished from works prepared for use by a general readership.

Contributions to collective works

Subsection (c) of section 201 deals with the troublesome problem of ownership of copyright in contributions to collective works, and the relationship between copyright ownership in a contribution and in the collective work in which it appears. The first sentence establishes the basic principle that copyright in the individual contribution and copyright in the collective work as a whole are separate and distinct, and that the author of the contribution is, as in every other case, the first owner of copyright in it. Under the definitions in section 101, a “collective work” is a species of “compilation” and, by its nature, must involve the selection, assembly, and arrangement of “a number of contributions.” Examples of “collective works” would ordinarily

include periodical issues, anthologies, symposia, and collections of the discrete writings of the same authors, but not cases, such as a composition consisting of words and music, a work published with illustrations or front matter, or three one-act plays, where relatively few separate elements have been brought together. Unlike the contents of other types of "compilations," each of the contributions incorporated in a "collective work" must itself constitute a "separate and independent" work, therefore ruling out compilations of information or other uncopyrightable material and works published with editorial revisions or annotations. Moreover, as noted above, there is a basic distinction between a "joint work," where the separate elements merge into a unified whole, and a "collective work," where they remain unintegrated and disparate.

The bill does nothing to change the rights of the owner of copyright in a collective work under the present law. These exclusive rights extend to the elements of compilation and editing that went into the collective work as a whole, as well as to the contributions that were written for hire by employees of the owner of the collective work, and those copyrighted contributions that have been transferred in writing to the owner by their authors. However, one of the most significant aims of the bill is to clarify and improve the present confused and frequently unfair legal situation with respect to rights in contributions.

The second sentence of section 201(c), in conjunction with the provisions of section 403 dealing with copyright notice, will preserve the author's copyright in his contribution even if the contribution does not bear a separate notice in his name, and without requiring any unqualified transfer of rights to the owner of the collective work. This is coupled with a presumption that, unless there has been an express transfer of more, the owner of the collective work acquires "only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series." Although magazine publishers objected to this presumption as discriminatory, the committee believes that it is fully consistent with present law and practice and that it represents a fair balancing of the equities.

The magazine contributors, while strongly supporting the basic presumption in their favor, suggested that the last clause be deleted as unduly restrictive. However, the committee considers this clause, under which the privilege of republishing the contribution under certain limited circumstances would be presumed, as an essential counterpart of the basic presumption. Under the language which has been retained a publisher could reprint a contribution from one issue in a later issue of his magazine, or could reprint an article from a 1970 edition of an encyclopedia in a 1980 revision of it; he could not revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work.

Transfer of ownership

The principle of unlimited alienability of copyright is stated in clause (1) of section 201(d). Under that provision the ownership of a copyright, or of any part of it, may be transferred by any means of conveyance or by operation of law, and is to be treated as personal property upon the death of the owner. The term "transfer of copyright ownership" is defined in section 101 to cover any "conveyance,

alienation, or hypothecation," including assignments, mortgages, and exclusive licenses, but not including nonexclusive licenses. Representatives of motion picture producers have argued that foreclosures of copyright mortgages should not be left to varying State laws, and that the statute should establish a Federal foreclosure system. However, the benefits of such a system would be of very limited application, and would not justify the complicated statutory and procedural requirements that would have to be established.

Clause (2) of subsection (d) contains the first explicit statutory recognition of the principle of divisibility of copyright in our law. This provision, which has long been sought by authors and their representatives, and which has attracted wide support from other groups, means that any of the exclusive rights that go to make up a copyright, including those enumerated in section 106 and any subdivision of them, can be transferred and owned separately. The definition of "transfer of copyright ownership" in section 101 makes clear that the principle of divisibility applies whether or not the transfer is "limited in time or place of effect," and another definition in the same section provides that the term "copyright owner," with respect to any one exclusive right, refers to the owner of that particular right. The last sentence of section 201(d)(2) adds that the owner, with respect to the particular exclusive right he owns, is entitled "to all of the protection and remedies accorded to the copyright owner by this title." It is thus clear, for example, that a local broadcaster who has an exclusive license to transmit a particular work within a particular geographic area and for a particular period of time could sue, in his own name as copyright owner, someone who infringed that particular exclusive right.

The only objection to this provision at the hearings was raised by the Justice Department, whose statement expressed concern that the principle of divisibility might result in multiple infringement suits against the Government under section 1498(b) of title 28, United States Code. However, the committee feels that the problem of guarding against a multiplicity of suits is properly dealt with in section 501(b) of the bill, to be discussed below, and therefore did not accept the Department's recommendation that copyrights be made indivisible for purposes of suits against the United States.

SECTION 202. DISTINCTION BETWEEN OWNERSHIP OF COPYRIGHT AND MATERIAL OBJECT

The principle restated in section 202 is a fundamental and important one: that copyright ownership and ownership of a material object in which the copyrighted work is embodied are entirely separate things. Thus, transfer of a material object does not of itself carry any rights under the copyright, and this includes transfer of the copy or phonorecord—the original manuscript, the photographic negative, the unique painting or statue, the master tape recording, etc.—in which the work was first fixed. Conversely, transfer of a copyright does not necessarily require the conveyance of any material object.

In stating the principle that the transfer of a material object does not necessarily convey rights under the copyright, the 1965 bill referred to "any exclusive rights in the copyrighted work embodied in

the object; * * *." There were objections to the use of the word "exclusive" in this phrase, and the committee deleted the word to avoid any implication that nonexclusive rights might be presumed to be conveyed with the material object.

As a result of the interaction of this section and the provisions of sections 204(a) and 301, the bill would change a common law doctrine exemplified by the decision in *Pushman v. New York Graphic Society, Inc.*, 287 N.Y. 302, 39 N.E. 2d 249 (1942). Under that doctrine, an author or artist is generally presumed to transfer his common law literary property rights when he sells his manuscript or work of art, unless he specifically reserves them. This presumption would be reversed under the bill, since a specific written conveyance of rights would be required in order for a sale of any material object to carry with it a transfer of copyright.

SECTION 203. TERMINATION OF TRANSFERS AND LICENSES

The problem in general

It was obvious at the 1965 hearings that a certain accommodation among the affected interests had been achieved with respect to the so-called "reversion" problem dealt with in section 203. The history of that development is summarized fully and accurately in the Register's Supplementary Report, and the committee is aware of that history.

After careful consideration, the committee concluded that the reversionary provisions of the present section on copyright renewal (17 U.S.C. sec. 24) should be eliminated, and that the proposed law should substitute for them a provision safeguarding authors against unremunerative transfers. A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited.

Section 203 of the present bill reflects a practical compromise that will further the objectives of the copyright law while recognizing the problems and legitimate needs of all interests involved. The constructive spirit manifested by those who have contributed to this compromise reflects credit on all those responsible.

The committee believes that the framework and principal provisions of section 203 offer a workable solution to the "reversion" problem, and that their adoption would be in the public interest. In its general provisions the section in the 1965 bill attracted fairly wide support; and, while there was some opposition on principle, motion picture producers for their part indicated that they could accept the compromise if it were not substantially changed to the disadvantage of their industry. The committee adopted some amendments in the details of section 203 of the 1965 bill, which have required a substantial amount of redrafting, but the broad principles of the compromise have been retained.

The Register's Supplementary Report, at pages 72 to 76, contains a thorough summary of the contents of section 203, as it appeared in the 1965 bill. In the paragraphs that follow, the report of this committee will draw heavily upon that summary, supplementing it with a detailed explanation of the changes that have been made and the reasons for them.

Scope of the provision

Instead of being automatic, as is theoretically the case under the present renewal provision, the termination of a transfer or license under section 203 would require the serving of an advance notice within specified time limits and under specified conditions. However, although affirmative action is needed to effect a termination, the right to take this action cannot be waived in advance or contracted away. Under section 203(a) the right of termination would apply only to transfers and licenses executed after the effective date of the new statute, and would have no retroactive effect.

The right of termination would be confined to inter vivos transfers or licenses executed by the author, and would not apply to transfers by his successors in interest or to his own bequests. The scope of the right would extend not only to any "transfer of copyright ownership," as defined in section 101, but also to nonexclusive licenses. As mentioned earlier, the right of termination would not apply to "works made for hire," which is one of the principal reasons the definition of that term assumed importance.

Who can terminate a grant

Under the 1965 bill, the right to terminate a grant was given to the author who executed it, if living, or if dead to his widow (or her widower) and children. The terms "widow," "widower," and "children" were defined in section 101 in an effort to avoid problems and uncertainties that have arisen under the present renewal section. The children of a dead child were allowed to succeed to their parent's right, but no one beyond the author's grandchildren was given any right of termination. Section 203(a)(3) explicitly required, as a condition of termination, that an advance notice be served and that it be signed by all of those entitled to terminate. In other words, where the author was dead and the right of termination belonged to two or more persons, unanimity among them would have been required in order for termination to have been effected.

These provisions were criticized on two grounds: First, that they did not make clear the requirements applicable to works of joint authorship where the grant had been signed by two or more of the authors; and second, that the requirement for absolute unanimity raised serious dangers of one or more beneficiaries being induced to "hold out" or of unknown children or grandchildren being discovered later. The authors' concern with the second problem was particularly urgent, and the Register's Supplementary Report acknowledged that both problems required further consideration. On the other hand, the motion picture producers expressed opposition to any dilution of the requirement for unanimity.

After the introduction of the 1965 bill and before the hearings began, representatives of the Authors League and of the principal organizations of book publishers achieved a compromise which, in very broad terms, would substitute a requirement for majority rather than for unanimous action. The principal features of this compromise, which were presented to the committee at the hearings, involved more than the question of who would be required to file a notice of termination, and can be summarized as follows:

(1) Where the work is one of joint authorship and more than one of the authors signed the grant, termination would require the action of a majority of the authors or of their interests.

(2) Where an author is dead, his interest can be exercised by action of a per stirpes majority of his widow, children, and the children of any dead children; the widow's share (if any) would represent half of the interest and the remainder would be divided according to the number of the author's children represented.

(3) The same requirements for majority action would apply to any further grant of rights after they had reverted.

The committee spent a good deal of time on this question. It recognized the desire of motion picture producers and others to retain the 1965 bill's unqualified requirement of unanimity, and the advantages of certainty and relative simplicity that that requirement would have. It concluded, however, that the problems of holdouts and unknowns would be likely to make the provision unfair or unworkable in practice. Of the remaining three alternatives—allowing one member of the group to bind all the others, allowing unlimited fragmentation, or requiring majority action—the third seems distinctly preferable. The committee has therefore adopted the substance of the proposed compromise. This decision created formidable drafting problems and has necessarily resulted in a long and complex provision.

The committee's technical determination of this point, as implemented in the amendments of section 203, can be summarized as follows:

(1) In the case of a work of joint authorship, where the grant was signed by two or more of the authors, majority action by those who signed the grant, or by their interests, would be required to terminate it.

(2) There are three different situations in which the shares of joint authors, or of a dead author's widow, children, and grandchildren, must be divided under the statute: (1) the right to effect a termination, (2) the ownership of the terminated rights, and (3) the right to make further grants of reverted rights. The committee decided to divide the respective shares of the authors, and of a dead author's widow, children, and grandchildren, in exactly the same way in each of these situations.

(3) The committee also decided to apply the principle of per stirpes representation in exactly the same way in all three situations. Take, for example, a case where a dead author left a widow, two living children, and three grandchildren by a third child who is dead. The widow will own half of the reverted interests, the two children will each own $16\frac{2}{3}$ percent, and the three grandchildren will each own a share of roughly $5\frac{1}{2}$ percent. But who can exercise the right of termination? Obviously, since she owns 50 percent, the widow is an essential party, but suppose neither of the two surviving children is willing to join her in the termination; is it enough that she gets one of the children of the dead child to join, or can the dead child's interest be exercised only by the action of a majority of his children? Consistent with the per stirpes principle, the committee decided that the interest of a dead child can be exercised only as a unit by majority action of his surviving children. Thus, even though

the widow and one grandchild would own 55½ percent of the reverted copyright, they would have to be joined by another child or grandchild in order to effect a termination or a further transfer of reverted rights. This principle also applies where, for example, two joint authors executed a grant and one of them is dead; in order to effect a termination, the living author must be joined by a per stirpes majority of the dead author's beneficiaries. The notice of termination may be signed by the specified owners of termination interests or by "their duly authorized agents," which would include the legally appointed guardians or committees of persons incompetent to sign because of age or mental disability.

When a grant can be terminated

Section 203 draws a distinction between the date when a termination becomes effective and the earlier date when the advance notice of termination is served. With respect to the ultimate effective date, section 203(a)(2) provides, as a general rule, that a grant may be terminated during the 5 years following the expiration of a period of 35 years from the execution of the grant. As an exception to this basic 35-year rule, clause (2) of the 1965 bill also provided that "if the grant covers the right of first publication of the work, the period begins at the end of 35 years from the date of first publication of the work or at the end of 40 years from the date of execution of the grant, whichever term ends earlier." This alternative method of computation was intended to meet the arguments of book publishers and others, who contended that an exception is needed to cover cases where years elapse between the signing of a publication contract and the eventual publication of the work. The compromise proposal of the authors and book publishers recommended that this principle should apply to any publication contract, and not just to contracts involving first publication; the committee agreed with this recommendation and therefore amended the clause accordingly.

The effective date of termination, which must be stated in the advance notice, is required to fall within the 5 years following the end of the applicable 35- or 40-year period, but the advance notice itself must be served earlier. Under section 203(a)(3)(A), the notice must be served "not less than two or more than ten years" before the effective date stated in it.

As examples of how these time-limit requirements would operate in practice, we suggest two typical contract situations:

Case 1: Contract for theatrical production signed on September 1, 1975. Termination of grant can be made to take effect between September 1, 2010 (35 years from execution) and September 1, 2015 (end of 5-year termination period). Assuming that the author decides to terminate on September 1, 2010 (the earliest possible date), his advance notice must be filed between September 1, 2000, and September 1, 2008.

Case 2: Contract for book publication executed on April 10, 1980; book finally published on August 23, 1987. Since contract covers the right of publication, the 5-year termination period would begin on April 10, 2020 (40 years from execution) rather than April 10, 2015 (35 years from execution) or August 23, 2222 (35 years from publication). Assume that the author decides to make the termination effective

tive on January 1, 2224; he would have to serve his advance notice between January 1, 2214, and January 1, 2222.

Effect of termination

Section 203(b) makes clear that, unless effectively terminated within the applicable 5-year period, all rights covered by an existing grant will continue unchanged, and that rights under other Federal, State, or foreign laws are unaffected. However, assuming that a copyright transfer or license is terminated under section 203, who are bound by the termination and how are they affected?

Under the present bill, termination means that ownership of the rights covered by the terminated grant revert to everyone who owns termination interests on the date the notice of termination was served, whether they joined in signing the notice or not. In other words, if a person could have signed the notice, he is bound by the action of the majority who did; the termination of the grant will be effective as to him, and a proportionate share of the reverted rights automatically vests in him. Ownership is divided proportionately on the same per stirpes basis as that provided for the right to effect termination under section 203(a) and, since the reverted rights vest on the date notice is served, the heirs of a dead beneficiary would inherit his share.

As indicated above, the committee's amendment of the 1965 bill contains an important new provision in clause (3) of subsection (b), under which majority action is required to make a further grant of reverted rights. A problem here, of course, is that years may have passed between the time the reverted rights vested and the time the new owners want to make a further transfer; people may have died and children may have been born in the interim. To deal with this problem, the present bill looks back to the date of vesting; out of the group in whom rights vested on that date, it requires the further transfer or license to be signed by "the same number and proportion of the owners" (though not necessarily the same individuals) as were then required to terminate the grant under subsection (a). If some of those in whom the rights originally vested have died, their "legal representatives, legatees, or heirs at law" may represent them for this purpose and, as in the case of the termination itself, any one of the minority who does not join in the further grant is nevertheless bound by it.

An important limitation on the rights of a copyright owner under a terminated grant is specified in section 203(b)(1). This clause provides that, notwithstanding a termination, a derivative work prepared earlier may "continue to be utilized" under the conditions of the terminated grant; the clause adds, however, that this privilege is not broad enough to permit the preparation of other derivative works. In other words, a film made from a play could continue to be licensed for performance after the motion picture contract had been terminated, but any remake rights covered by the contract would be cut off. For this purpose, a motion picture would be considered as a "derivative work" with respect to every "preexisting work" incorporated in it, whether the preexisting work was created independently or was prepared expressly for the motion picture.

Section 203 would not prevent the parties to a transfer or license from voluntarily agreeing at any time to terminate an existing grant and negotiating a new one, thereby causing another 35-year period to start running. However, the bill seeks to avoid the situation that

has arisen under the present renewal provision, in which third parties have bought up contingent future interests as a form of speculation. Section 203(b)(2) would make a further grant of rights that revert under a terminated grant valid "only if it is made after the effective date of the termination." An exception, in the nature of a right of "first refusal," would permit the original grantee or his successor to negotiate a new agreement with the persons effecting the termination at any time after the notice of termination has been served. Despite objection by the Justice Department that the original grantee should not be placed in a preferred competitive position, the committee believes that the "first-refusal" exception is justified by the circumstances.

SECTIONS 204, 205. EXECUTION AND RECORDATION OF TRANSFERS

Section 204, which attracted no comment during the hearings or thereafter, is a somewhat broadened and liberalized counterpart of sections 28 and 29 of the present statute. Under subsection (a), a transfer of copyright ownership (other than one brought about by operation of law) is valid only if there exists an instrument of conveyance, or alternatively a "note or memorandum of the transfer," which is in writing and signed by the copyright owner "or his duly authorized agent." Subsection (b) makes clear that a notarial or consular acknowledgment is not essential to the validity of any transfer, whether executed in the United States or abroad. However, the subsection would liberalize the conditions under which certificates of acknowledgment of documents executed abroad are to be accorded prima facie weight, and would give the same weight to domestic acknowledgments under appropriate circumstances.

The recording and priority provisions of section 205, which attracted somewhat more attention, are intended to clear up a number of uncertainties arising from sections 30 and 31 of the present law and to make them more effective and practical in operation. Any "document pertaining to a copyright" may be recorded under subsection (a) if it "bears the actual signature of the person who executed it," or if it is appropriately certified as a true copy. However, subsection (c) makes clear that the recorded document will give constructive notice of its contents only if two conditions are met: (1) the document or attached material specifically identifies the work to which it pertains so that a reasonable search under the title or registration number would reveal it, and (2) registration has been made for the work.

The committee endorses the provisions of subsection (d), requiring recordation of transfers as a prerequisite to the institution of an infringement suit, as a desirable change in the law. The committee disagreed with the recommendation of magazine publishers that the provisions of section 205(e), dealing with priority between conflicting transfers, be made applicable to published works only. On the other hand, the committee found convincing the arguments of motion picture producers that the 2- and 4-month grace periods provided in subsection (e) of the 1965 bill represent too long a hiatus during which it is impossible for a bona fide transferee to rely on the record, and accordingly reduced the respective periods to 1 and 2 months. This subsection was also amended to make clear that the pro-

visions of clauses (1) and (2) of subsection (d) with respect to recordation as constructive notice apply to the requirements for establishment of priorities between conflicting transfers.

Under subsection (f) of section 205, a nonexclusive license, whether recorded or not, would be valid against a later transfer, and would also prevail as against a prior unrecorded transfer if taken in good faith and without notice. Objections were raised by motion picture producers, particularly to the provision allowing unrecorded nonexclusive licenses to prevail over subsequent transfers, on the ground that a nonexclusive license can have drastic effects on the value of a copyright. The committee, while recognizing the practical problems of transferees in identifying and dealing with outstanding nonexclusive licenses, concluded that the impracticalities and burdens that would accompany any requirement of recordation of nonexclusive licenses outweigh the limited advantages of a statutory recordation system for them. On the other hand, it accepted the proposal, advanced by producers of audiovisual materials, that subsection (f) in the 1965 bill be amended to require a nonexclusive license to be in writing and signed by the copyright owner before it can be given priority over a conflicting transfer.

SECTION 301. FEDERAL PREEMPTION OF RIGHTS EQUIVALENT TO COPYRIGHT

Single Federal system

Section 301, one of the bedrock provisions of the bill, would accomplish a fundamental and significant change in the present law. Instead of the dual system of "common law copyright" for unpublished works and statutory copyright for published works, which has been in effect in the United States since the first copyright statute in 1790, the bill adopts a single system of Federal statutory copyright from creation. Under section 301 a work would obtain statutory protection as soon as it is "created" or, as that term is defined in section 101, when it is "fixed in a copy or phonorecord for the first time." Common law copyright protection for works coming within the scope of the statute would be abrogated, and the concept of publication would lose its all-embracing importance as a dividing line between common law and statutory protection and between both of these forms of legal protection and the public domain.

The record of the hearings reflects strong and widespread support for the principle of section 301, and practically no opposition to it. The committee is fully convinced that, by substituting a single Federal system for the present anachronistic, uncertain, impractical, and highly complicated dual system, the bill would greatly improve the operation of the copyright law and would be much more effective in carrying out the basic constitutional aims of uniformity and the promotion of writing and scholarship. The main arguments in favor of a single Federal system, to which the committee subscribes, can be summarized as follows:

(1) One of the fundamental purposes behind the copyright clause of the Constitution, as shown in Madison's comments in *The Federalist*, was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States. Today,

when the methods for dissemination of an author's work are incomparably broader and faster than they were in 1789, national uniformity in copyright protection is even more essential than it was then to carry out the constitutional intent.

(2) "Publication," perhaps the most important single concept under the present law, also represents its most serious defect. Although at one time, when works were disseminated almost exclusively through printed copies, "publication" could serve as a practical dividing line between common law and statutory protection, this is no longer true. With the development of the 20th-century communications revolution, the concept of publication has become increasingly artificial and obscure. To cope with the legal consequences of an established concept that has lost much of its meaning and justification, the courts have given "publication" a number of diverse interpretations, some of them radically different. Not unexpectedly, the results in individual cases have become unpredictable and often unfair. A single Federal system would clear up this chaotic situation.

(3) Enactment of section 301 would also implement the "limited times" provision of the Constitution, which has become distorted under the traditional concept of "publication." Common law protection in "unpublished" works is now perpetual, no matter how widely they may be disseminated by means other than "publication"; the bill would place a time limit on the duration of exclusive rights in them. The provision would also aid scholarship and the dissemination of historical materials by making unpublished, undissemated manuscripts available for publication after a reasonable period.

(4) Adoption of a uniform national copyright system would greatly improve international dealings in copyrighted material. No other country has anything like our present dual system. In an era when copyrighted works can be disseminated instantaneously to every country on the globe, the need for effective international copyright relations, and the concomitant need for national uniformity, assume ever greater importance.

Under section 301, the statute would apply to all works created after its effective date, whether or not they are ever published or disseminated. With respect to works created before the effective date of the statute and still under common law protection, section 303 of the statute would provide protection from that date on, and guarantees a minimum period of statutory copyright.

Preemption of State law

The intention of section 301 is to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright and that extend to works coming within the scope of the Federal copyright law. The committee has set out to declare this principle in section 301 in the clearest and most unequivocal language possible, so as to foreclose any possible misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection.

Under section 301 (a), "all rights in the nature of copyright"—which are specified as "copyright, literary property rights, or any equivalent legal or equitable right"—are governed exclusively by the Federal copyright statute if the work involved is of a kind covered by the

statute. All corresponding State laws, whether common law or statutory, are preempted and abrogated. Regardless of when the work was created and whether it is published or unpublished, disseminated or undissemated, in the public domain or copyrighted under the Federal statute, the States cannot offer it protection equivalent to copyright. Section 1338 of title 28, United States Code, also makes clear that any action involving rights under the Federal copyright law would come within the exclusive jurisdiction of the Federal courts. The preemptive effect of section 301 is limited to State laws; there is no intention to deal with the question of whether Congress can or should offer the equivalent of copyright protection under some constitutional provision other than the patent-copyright clause of article 1, section 8.

As long as a work fits within one of the general subject matter categories of sections 102 and 103, the bill prevents the States from protecting it even if it fails to achieve Federal statutory copyright because it is too minimal or lacking in originality to qualify, or because it has fallen into the public domain. On the other hand, the 1965 bill implicitly preserved common law copyright protection for one important class of works: works that have not been "fixed in any tangible medium of expression." Examples would include choreography that has never been filmed or notated, an extemporaneous speech, "original works of authorship" communicated solely through conversations or live broadcasts, a dramatic sketch or musical composition improvised or developed from memory and without being recorded or written down. As mentioned above in connection with section 102, unfixed works are not included in the specified "subject matter of copyright." They are therefore not affected by the preemption of section 301, and would continue to be subject to protection under State statutes or common law until fixed in tangible form. Because of the significance of this principle, the committee amended section 301(b) of the 1965 bill to make it explicit.

The preemption of rights under State law is complete with respect to any work coming within the scope of the bill, even though the scope of exclusive rights given the work under the bill is narrower than the scope of common law rights in the work might have been. The most striking example of this is found in the case of sound recordings, which are brought under the Federal statute for the first time, but which are denied performing rights under section 114; the record producers, as explained above, have expressed opposition to this feature of the bill.

Representatives of printers, while not opposed to the principle of section 301, expressed concern about its potential impact on protection of preliminary advertising copy and layouts prepared by printers. They argued that this material is frequently "pirated" by competitors, and that it would be a substantial burden if, in order to protect himself, the printer would have to register his works and bear the expense and bother of suing in Federal rather than State courts. While sympathetic with the practical problems of printers in this situation, the committee viewed them as essentially procedural rather than substantive, and did not regard the proposal for a special exemption to preserve common law rights equivalent to copyright in unpublished advertising material as justified. Moreover, subsection (b), discussed be-

low, will preserve other legal grounds on which the printers can protect themselves against "pirates" under State laws.

At the hearings the Deputy Archivist of the United States recommended addition of a provision making clear that the preemption of common law rights does not override the existing statutory immunity of the General Services Administration with respect to infringement of presidential papers under common law protection. In response to this request, the committee added a subsection to section 5 of the 1965 bill's transitional and supplementary provisions, amending section 510 of the Federal Records Act of 1950 (64 Stat. 589, 44 U.S.C. § 400 (1964)) to extend immunity with respect to "letters and other intellectual productions (exclusive of patented material, published works under copyright protection, and unpublished works for which copyright registration has been made) * * *"

In a general way subsection (b) of section 301 represents the obverse of subsection (a). It sets out, in broad terms and without necessarily being exhaustive, some of the principal areas of protection that preemption would not prevent the States from protecting. Its purpose is to make clear, consistent with the 1964 Supreme Court decisions in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, that preemption does not extend to causes of action or unpublished subject matter outside the scope of the revised Federal copyright statute.

The operative phrase at the beginning of subsection (b) in the 1965 bill—"Nothing in this title annuls or limits any rights or remedies under the law of any State with respect to: * * *"—was criticized because of its failure to correspond to the reference immediately preceding it, at the end of subsection (a), to "the common law or statutes of any State." No difference in meaning is intended, and the committee therefore amended subsection (b) to make the two references uniform.

The numbered clauses of subsection (b) list three general areas left unaffected by the preemption: (1) unpublished material outside the subject matter of copyright; (2) causes of action arising under State law before the effective date of the statute; and (3) violations of rights that are not equivalent to any of the exclusive rights under copyright. Clause (1) is limited to unpublished material to make clear that there is no intention to change the established doctrine of *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), and many later cases: that common law protection in a work terminates upon its publication. Use of the word "unpublished" avoids any implication that common law protection equivalent to copyright, for material outside the subject matter of the statute, might continue after "publication" as that term is defined in section 101.

The examples in clause (3), while not exhaustive, are intended to illustrate rights and remedies that are different in nature from the rights comprised in a copyright and that may continue to be protected under State common law or statute. The evolving common law rights of "privacy," "publicity," and trade secrets, and the general laws of defamation and fraud, would remain unaffected as long as the causes of action contain elements, such as an invasion of personal rights or a breach of trust or confidentiality, that are different in kind from copyright infringement. Nothing in the bill derogates from the rights of

parties to contract with each other and to sue for breaches of contract; however, to the extent that the unfair competition concept known as "interference with contract relations" is merely the equivalent of copyright protection, it would be preempted.

The last example listed in clause (3)—"deceptive trade practices such as passing off and false representation"—represents an effort to distinguish between those causes of action known as "unfair competition" that the copyright statute is not intended to preempt and those that it is. Use of the term "unfair competition" itself has been avoided because of its inherent ambiguity. In accordance with the Supreme Court's decision in *Sears, Roebuck & Co. v. Stiffel Co.*, section 301 is not intended to preempt common law protection in cases involving activities such as false labeling, fraudulent representation, and passing off, even where the subject matter involved comes within the scope of the copyright statute. However, where the cause of action involves the form of "unfair competition" commonly referred to as "misappropriation," which is nothing more than copyright protection under another name, section 301 is intended to have preemptive effect.

SECTION 302. DURATION OF COPYRIGHT IN WORKS CREATED AFTER EFFECTIVE DATE

In general

The debate over how long a copyright should last is as old as the oldest copyright statute and will doubtless continue as long as there is a copyright law. True to form, this controversy burned brightly at an earlier stage of the present revision program, but had died down substantially by the time the 1965 bill was introduced. At the hearings there was, with certain exceptions, general and quite strong support for the principle, as embodied in the bill, of a copyright term consisting of the life of the author and 50 years after his death. In particular, the authors and their representatives stressed that the adoption of a life-plus-50 term was by far their most important legislative goal in copyright law revision. The Register of Copyrights in his 1961 Report had favored a renewable term totaling 76 years rather than a term based on the life of the author; he explained to the committee why he changed his mind and now regards a life-plus-50 term as not only the distinctly preferable alternative but as the foundation of the entire bill.

Under the present law statutory copyright protection begins on the date of publication (or on the date of registration in unpublished form) and continues for 28 years from that date; it may be renewed for a second 28 years, making a total potential term of 56 years in all cases.¹ The principal elements of this system—a definite number of years, computed from either publication or registration, with a renewal feature—have been a part of the U.S. copyright law since the first statute in 1790. The arguments that have been advanced for changing this system to one based on the life of the author can be summarized as follows:

1. The present 56-year term is not long enough to insure an author and his dependents the fair economic benefits from his works. Life

¹ Under Public Laws 87-668 and 89-142, copyrights that were subsisting in their renewal term on Sept. 19, 1962, and that were scheduled to expire before Dec. 31, 1967, have been extended to that later date, in anticipation that general revision legislation extending their terms still further will be enacted by then.

expectancy has increased substantially, and more and more authors are seeing their works fall into the public domain during their lifetimes, forcing later works to compete with their own early works in which copyright has expired.

2. The tremendous growth in communications media has substantially lengthened the commercial life of a great many works. A short term is particularly discriminatory against serious works of music, literature, and art, whose value may not be recognized until after many years.

3. Although limitations on the term of copyright are obviously necessary, too short a term harms the author without giving any substantial benefit to the public. The public frequently pays the same for works in the public domain as it does for copyrighted works, and the only result is a commercial windfall to certain users at the author's expense. In some cases the lack of copyright protection actually restrains dissemination of the work, since publishers and other users cannot risk investing in the work unless assured of exclusive rights.

4. A system based on the life of the author would go a long way toward clearing up the confusion and uncertainty involved in the vague concept of "publication," and would provide a much simpler, clearer method for computing the term. The death of the author is a definite, determinable event, and it would be the only date that a potential user would have to worry about. All of a particular author's works, including those successively revised by him, would fall into the public domain at the same time, thus avoiding the present problems of determining a multitude of publication dates and of distinguishing "old" and "new" matter in later editions. The bill answers the problems of determining when relatively obscure authors died, by establishing a registry of death dates and a system of presumptions.

5. One of the worst features of the present copyright law is the provision for renewal of copyright. A substantial burden and expense, this unclear and highly technical requirement results in incalculable amounts of unproductive work. In a number of cases it is the cause of inadvertent and unjust loss of copyright. It was urged that under a life-plus-50 system the renewal device would be inappropriate and unnecessary.

6. Under the preemption provisions of section 301 and the single Federal system they would establish, authors will be giving up perpetual, unlimited exclusive common law rights in their unpublished works, including works that have been widely disseminated by means other than publication. A statutory term of life-plus-50 years is no more than a fair recompense for the loss of these perpetual rights.

7. A very large majority of the world's countries have adopted a copyright term of the life of the author and 50 years after his death. Since American authors are frequently protected longer in foreign countries than in the United States, the disparity in the duration of copyright has provoked considerable resentment and some proposals for retaliatory legislation. Copyrighted works move across national borders faster and more easily than virtually any other economic commodity, and with the techniques now in common use this movement has in many cases become instantaneous and effortless. The need to conform the duration of U.S. copyright to that prevalent throughout the rest of the world is increasingly pressing in order to

provide certainty and simplicity in international business dealings. Even more important, a change in the basis of our copyright term would place the United States in the forefront of the international copyright community, and would bring about a great and immediate improvement in our copyright relations. All of these benefits would accrue directly to American and foreign authors alike.

The committee was impressed by the overwhelming support for a life-plus-50 system among all those concerned with copyright law revision. However, recognizing the fundamental importance of the duration provisions in the bill, the committee did not consider the issue as settled, but reviewed the substantive merits of these arguments at length, both independently and in light of the arguments of opposing witnesses. The latter included: magazine publishers, who, with some dissent, favored a single, fixed term as more definite and who questioned whether a 75- to 100-year term, proposed for anonymous and pseudonymous works and works made for hire, might not be too long; broadcasters, who favored a 28-plus-48-year term as offering more certainty; library organizations who, although split on the question, spoke in favor of a single fixed term with an increase in length; a reprint publisher who favored retaining the present term; and a group representing educational institutions and organizations, who expressed "misgivings" about a life-plus-50 term and recommended a first term of 28 years, with a renewal arrangement and a second term of possibly 48 years. The Federal Communications Commission argued in favor of retaining a renewal device as a benefit to educational broadcasters, unless the latter were given a more general exemption. The Justice Department, which had earlier opposed extension of the copyright term, expressly stated that it "prefers to make no recommendation."

The committee concluded that the need for a longer total term of copyright had been conclusively demonstrated. It is true that a major reason for the striking statistical increase in life expectancy since 1909 is the reduction in infant mortality, but this does not mean that the increase can be discounted. Although not nearly as great as the total increase in life expectancy, there has been a marked increase in longevity, and with medical discoveries and health programs for the elderly this trend shows every indication of continuing. If life expectancy in 1909, which was in the neighborhood of 56 years, offered a rough guide to the length of copyright protection, then life expectancy in the 1960's, which is well over 70 years, should offer a similar guide; the Register's 1961 Report included statistics indicating that something between 70 and 76 years was then the average equivalent of life-plus-50 years. The committee has concluded that an author's copyright should extend beyond his lifetime, and judged by this standard the present term of 56 years is too short.

The committee was impressed by the arguments as to the benefits of uniformity with foreign laws, and the advantages of international comity, that would result from adoption of a life-plus-50 term. The system has worked well in other countries, and on the whole it would appear to make computation of terms considerably simpler and easier. The registry of death dates and the system of presumptions established in section 302 would solve most of the problems in determining when an individual author died.

A point that concerned the committee arose from the possibility that, since a large majority (now about 85 percent) of all copyrighted works are not renewed, a life-plus-50-year term would tie up a substantial body of material that is probably of no commercial interest but that would be more readily available for scholarly use if free of copyright restrictions. A statistical study of renewal registrations made by the Copyright Office and submitted to the committee on March 2, 1966, supports the generalization that most material which is considered to be of continuing or potential commercial value is renewed. Of the remainder, a certain proportion is of practically no value to anyone, but there are a large number of unrenewed works that have scholarly value to historians, archivists, and specialists in a variety of fields. This consideration lay behind the proposal by educational groups for retaining the renewal device, and it also prompted various suggestions from scholarly organizations to limit the term for unpublished or unregistered works to something like 25 years after the author's death.

The committee is aware that today's ephemera represent tomorrow's social history, and that works of scholarly value, which are now falling into the public domain after 28 years, would be protected much longer under the bill. Balanced against this are the burdens and expenses of renewals, the near impossibility of distinguishing between types of works in fixing a statutory term, and the extremely strong case that has been made in favor of a life-plus-50 system. Moreover, it is important to realize that the bill would not restrain scholars from using any work as source material or from making "fair use" of it; the restrictions would extend only to the unauthorized reproduction or distribution of copies of the work, its public performance, or some other use that would actually infringe the copyright owner's exclusive rights. The committee believes that the advantages of a basic term of copyright enduring for the life of its author and for 50 years after his death outweigh any possible disadvantages.

Under subsection (a) of section 302, a work "created on or after" the effective date of the revised statute would be protected by statutory copyright "from its creation" and, with exceptions to be noted below, "endures for a term consisting of the life of the author and 50 years after his death."

Under this provision, as a general rule, the life-plus-50 term would apply equally to unpublished works, to works published during the author's lifetime, and to works published posthumously.

The definition of "created" in section 101, which will be discussed in more detail in connection with section 302(c) below, makes clear that "creation" for this purpose means the first time the work is fixed in a copy or phonorecord; up to that point the work is not "created," and is subject to common law protection, even though it may exist in someone's mind and may have been communicated to others in unfixed form. The effective date of the new statute, mentioned here and elsewhere in the 1965 bill as "January 1, 1967," is fixed in the present bill as "January 1, 1969."

Joint works

Since by definition a "joint work" has two or more authors, a statute basing the term of copyright on the life of the author must provide a special method of computing the term of "joint works." The 1965

bill provided in section 302(b) that, in the case of "a joint work prepared by two or more authors who did not work for hire," the term of copyright is to consist "of the life of the second of the authors to die and 50 years after his death." This provision differs from the system in effect in many foreign countries, under which the term of copyright is measured from the death of the last survivor of a group of joint authors, no matter how many there are. As explained at page 89 of the Register's Supplementary Report there were two reasons for this difference: (1) the concept of "joint work" is broader under U.S. law than it is under the laws of most foreign countries, and a considerably higher proportion of works would be given a longer term if the "last survivor" rule were adopted; and (2) basing the term on the life of the second author to die would ease a potential user's burdens, requiring him to discover the death dates of only two authors. The committee nevertheless concluded that these arguments were outweighed by those of various author, publisher, and motion picture organizations that the proposed system would be confusing and unfair in some cases. In particular, the committee was impressed by the need for uniformity with foreign laws and simplicity in international dealings. It therefore amended the reference to "the life of the second of the authors to die" to read "the life of the last surviving author."

Anonymous works, pseudonymous works, and works made for hire

Computing the term from the author's death also requires special provisions to deal with cases where the authorship is not revealed or where the "author" is not an individual. Section 302(c) therefore provides a special term for anonymous works, pseudonymous works, and works made for hire: 75 years from publication or 100 years from creation, whichever is shorter. The definitions in section 101 make the status of anonymous and pseudonymous works depend on what is revealed on the copies or phonorecords of a work; a work is "anonymous" if "no natural person is identified as author," and is "pseudonymous" if "the author is identified under a fictitious name."

In the 1965 bill, section 302(c) provided that the 75- or 100-year term for an anonymous or pseudonymous work could be converted to the ordinary life-plus-50 term if "the identity of one or more of the authors * * * is revealed in the registration or other public records of the Copyright Office," and that the term in such cases would be "based on the life of the author or authors whose identity has been revealed." A proposal to change this provision was made at the hearings on behalf of various author and publisher organizations; they argued that, instead of forcing a user to search through countless Copyright Office records to determine if an author's identity has been revealed, the bill should set up a special registry for the purpose. The committee adopted this proposal, and in its amendment of section 302(c) of the 1965 bill added requirements concerning the filing of identifying statements that parallel those of the following subsection (d) with respect to statements of the date of an author's death. Corresponding amendments were made in the fee provisions of section 708.

The alternative terms established in section 302(c)—75 years from publication or 100 years from creation, whichever expires first—are necessary to set a time limit on protection of unpublished material. For example, copyright in a work created in 1970 and published in 1980 would expire in 2055 (75 years from publication). A question

arises as to when the copyright should expire if the work is never published. Both the Constitution and the underlying purposes of the bill require the establishment of an alternative term for unpublished works, and the only practicable basis for this alternative is "creation." Under the bill a work created in 1970 but not published until after 2005 (or never published) would fall into the public domain in 2070 (100 years after creation).

The definition in section 101 provides that "creation" takes place when a work "is fixed in a copy or phonorecord for the first time." Although the concept of "creation" is inherently lacking in precision, its adoption in the bill would, for example, enable a scholar to use an unpublished manuscript written anonymously, pseudonymously, or for hire, if he determines on the basis of internal or external evidence that the manuscript is at least 100 years old. In the case of works written over a period of time or in successive revised versions, the definition provides that the portion of the work "that has been fixed at any particular time constitutes the work as of that time," and that, "where the work has been prepared in different versions, each version constitutes a separate work." Thus, a scholar or other user, in attempting to determine whether a particular work is in the public domain, needs to look no further than the particular version he wishes to use.

Although "publication" would no longer play the principal role assigned to it under the present law, the concept would still have significance under provisions throughout the bill, including those on Federal preemption and duration. Under the definition in section 101, a work is "published" if one or more copies or phonorecords embodying it are distributed to the public—that is, generally, to persons under no explicit or implicit restrictions with respect to disclosure of its contents—without regard to the manner in which the copies or phonorecords changed hands. This definition clears up the question of whether the sale of phonorecords constitutes publication, and it also makes plain that any form of dissemination in which a material object does not change hands—performances or displays on television, for example—is not a publication no matter how many people are exposed to the work.

In adopting the bill's 75- or 100-year term for anonymous and pseudonymous works and works made for hire, the committee accepts the reasons advanced in the Register's Supplementary Report at pages 91–92. Although these periods seem to be longer than the equivalent term provided by foreign laws and the Berne Conventions, this difference is more apparent than real. In general, the committee believes that the terms in these special cases should and do approximate, on the average, the term of the life of the author plus 50 years established for other works. It also believes that the 100-year maximum term for unpublished works, although much more limited than the perpetual term now available under common law in the United States and under statute in some foreign countries, is sufficient to guard against unjustified invasions of privacy and to fulfill our obligations under the Universal Copyright Convention.

Records and presumptions as to author's death

Subsections (d) and (e) of section 302 together furnish an answer to the practical problems of how to discover the death dates of obscure

or unknown authors. Subsection (d) provides a procedure for recording statements that an author died, or that he was still living, on a particular date, and also requires the Register of Copyrights to maintain obituary records on a current basis. Under subsection (e) anyone who, after a specified period, obtains certification from the Copyright Office that its records show nothing to indicate that the author is living or died less than 50 years before, is entitled to rely upon a presumption that the author has been dead for more than 50 years. The period specified in subsection (e)—75 years from publication or 100 years from creation—is purposely uniform with the special term provided in subsection (c).

SECTION 303. PREEXISTING WORKS UNDER COMMON LAW PROTECTION

Theoretically, at least, the legal impact of section 303 would be far reaching. Under it, every "original work of authorship" fixed in tangible form that is in existence would be given statutory copyright protection as long as the work is not in the public domain in this country. The vast majority of these works consist of private material that no one is interested in protecting or infringing, but section 303 would still have practical effects for a prodigious body of material already in existence.

Looked at another way, however, section 303 would have a genuinely restrictive effect. Its basic purpose is to substitute statutory for common law copyright for everything now protected at common law, and to substitute reasonable time limits for the perpetual protection now available. In general, the substituted time limits are those applicable to works created after the effective date of the law; for example, an unpublished work written in 1945 whose author dies in 1980 would be protected under the statute from the effective date (now stated as January 1, 1969) through 2030 (50 years after the author's death).

A special problem under this provision is what to do with works whose ordinary statutory terms will have expired or will be nearing expiration on the effective date. The committee believes that a provision taking away subsisting common law rights and substituting statutory rights for a reasonable period is fully in harmony with the constitutional requirements of due process, but it is necessary to fix a "reasonable period" for this purpose. Section 303 in the 1965 bill provided that under no circumstances would copyright protection expire before December 31, 1990, and also attempted to encourage publication by providing 25 years more protection (through 2015) if the work were published before the end of 1990.

Representatives of educators argued that no special consideration should be given to works whose ordinary terms have already or nearly expired, and the American Council of Learned Societies, while approving the 25-year inducement to publication, recommended that the initial date be changed from 1990 to 1980 or even earlier. The committee decided, however, that the periods established in the second sentence of section 303 are not too long, and that the first date in that sentence should be 25 years from the effective date; the provision has been amended accordingly so that the expiration dates in section 303 of the present bill are December 31, 1993, and December 31, 2018.

SECTION 304. DURATION OF SUBSISTING COPYRIGHTS

It has been estimated that when the new law goes into effect there will be some 6.6 million copyrights already subsisting: approximately 6 million still in their first term and 600,000 that have been renewed. The committee believes that the arguments in favor of lengthening the duration of copyright apply to subsisting as well as future copyrights, and that the bill's basic approach of increasing the present 56-year term to 75 years in the case of copyrights subsisting in both their first and their renewal terms is the simplest and fairest solution of the problem.

Copyrights in their first term

Subsection (a) of section 304 reenacts and preserves the renewal provision, now in section 24 of the statute, for all of the works presently in their first 28-year term. As explained in both of the Register's reports, a great many of the present expectancies in these cases are the subject of existing contracts, and it would be unfair and immensely confusing to cut off or alter these interests. It is significant that, despite the many justified objections to the renewal requirements, there has been no opposition to retaining them as a transitional provision applicable to works in their first term. Renewal registration will be required during the 28th year of the copyright but the length of the renewal term will be increased from 28 to 47 years.

Copyrights in their renewal term

Renewed copyrights that are subsisting in their second term at any time during the period between December 31, 1967, and December 31, 1968, inclusive, would be extended under section 304(b) to run for a total of 75 years. This provision would add another 19 years to the duration of any renewed copyright whose second term started during the 28 years immediately preceding the effective date of the act (January 1, 1969). In addition, it would extend by varying lesser amounts the duration of renewal copyrights already extended under Public Laws 87-668 (76 Stat. 555) and 89-142 (79 Stat. 581), all of which would otherwise expire on December 31, 1967. The subsection would also extend the duration of renewal copyrights whose second 28-year term is scheduled to expire during 1968. In none of these cases, however, would the total term of copyright for the work be longer than 75 years.

Subsection (b) also covers the special situation of a subsisting first-term copyright that becomes eligible for renewal registration during the year before the act comes into effect. If a renewal registration is not made before the effective date, the case is governed by the provisions of section 304(a). If a renewal registration is made during the year before the new law takes effect, however, the copyright would be treated as if it were already subsisting in its second term and would be extended to the full period of 75 years without the need for further renewal.

Termination of grants covering extended term

An issue underlying the 19-year extension of renewal terms under both subsections (a) and (b) of section 304 is whether, in a case where their rights have already been transferred, the author or his dependents should be given a chance to benefit from the extended term. The arguments for granting a right of termination are even more persuasive

under section 304 than they are under section 203; the extended term represents a completely new property right, and there are strong reasons for giving the author, who is the fundamental beneficiary of copyright under the Constitution, an opportunity to share in it.

In the 1965 bill, subsection (c) of section 304 was a close but not exact counterpart of section 203, and this remains true under the present bill as to both sections. In the case of either a first-term or renewal copyright already subsisting when the new statute becomes effective, any grant of rights covering the renewal copyright in the work, executed before the effective date, may be terminated under conditions and limitations similar to those provided in section 203. Except for transfers and licenses covering renewal copyrights already extended under Public Law 87-668 and 89-142, which would become subject to termination immediately upon the coming into effect of the revised law, the 5-year period during which termination could be made effective would start 56 years after copyright was originally secured.

The bill distinguishes between the persons who can terminate a grant under section 203 and those entitled to terminate a grant covering an extended term under section 304. Instead of being limited to transfers and licenses executed by the author, the right of termination under section 304(c) also extends to grants executed by those beneficiaries of the author who can claim renewal under the present law: his widow, children, executors, or next of kin.

There is good reason for this difference. Under section 203, an author's widow and children are given rights of termination if the author is dead, but these rights apply only to grants by the author, and any effort by a widow or child to transfer contingent future interests under a termination would be ineffective. In contrast, under the present renewal provisions, any statutory beneficiary of the author can make a valid transfer or license of future renewal rights, which is completely binding if the author is dead and the person who executed the grant turns out to be the proper renewal claimant. Because of this, a great many contingent transfers of future renewal rights have been obtained from widows, children, and next of kin, and a substantial number of these will be binding. The committee believes that, after the present 28-year renewal period has ended, a statutory beneficiary who has signed a disadvantageous grant of this sort should have the opportunity to reclaim the extended term.

As explained above in connection with section 203, the committee has adopted the principle that, where a transfer or license by the author is involved, termination may be effected by a per stirpes majority of those entitled to terminate, and has applied this principle to the ownership of rights under a termination and to the making of further grants of reverted rights. In general, this principle has also been applied to the termination of rights under an extended renewal copyright in section 304, but with several differences made necessary by the differences between the legal status of transfers and licenses made after the effective date of the new law (governed by sec. 203) and that of grants of renewal rights made earlier and governed by section 304(c). The following are the most important distinctions between the termination rights under the two sections:

1. *Joint authorship.*—Under section 304, a grant of renewal rights executed by joint authors during the first term of copyright would be effective only as to those who were living at the time of renewal; where

any of them is dead, their statutory beneficiaries are entitled to claim the renewal independently as a new estate. It would therefore be inappropriate to impose a requirement of majority action with respect to transfers executed by two or more joint authors.

2. *Grants not executed by author.*—Section 304(c) adopts the majority principle underlying the amendments of section 203 with respect to the termination rights of a dead author's widow and children. There is much less reason, as a matter of policy, to apply this principle in the case of transfers and licenses of renewal rights executed under the present law by the author's widow, children, executors, or next of kin, and the practical arguments against doing so are conclusive. It is not clear how the shares of a class of renewal beneficiaries are to be divided under the existing law, and greater difficulties would be presented if any attempt were made to apply the majority principle to further beneficiaries in cases where one or more of the renewal beneficiaries are dead. The committee has therefore retained the requirement of section 304(c) that, where the grant was executed by a person or persons other than the author, termination can be effected only by the unanimous action of the survivors of those who executed it.

3. *Further grants.*—The reasons against adopting a principle of majority action with respect to the right to terminate grants by joint authors and grants not executed by the author apply equally with respect to the right to make further grants under section 304(c). The requirement for majority action in clause (6)(C) is therefore confined to cases where the rights under a grant by the author have reverted to his widow, children, or both. Where the extended term reverts to joint authors or to a class of renewal beneficiaries who have joined in executing a grant, their rights would be governed by the general rules of tenancy in common; each coowner would have an independent right to sell his share, or to use or license the work subject to an accounting.

SECTION 305. YEAR END EXPIRATION OF TERMS

Under section 305, which has its counterpart in the laws of most foreign countries, the term of copyright protection for a work extends through December 31 of the year in which the term would otherwise have expired. This will make the duration of copyright much easier to compute, since it will be enough to determine the year, rather than the exact date, of the event from which the term is based.

Section 305 applies only to "terms of copyright provided by sections 302 through 304," which are the sections dealing with duration of copyright. It therefore has no effect on the other time periods specified in the bill; and, since they do not involve "terms of copyright," the periods provided in section 304(c) with respect to termination of grants are not affected by section 305.

The terminal date section would change the duration of subsisting copyrights under section 304 by extending the total terms of protection under subsections (a) and (b) to the end of the 75th year from the date copyright was secured. A copyright subsisting in its first term on the effective date of the act would run through December 31 of the 28th year and would then expire unless renewed. Since all copyright terms under the bill expire on December 31, and since section 304(a) requires that renewal be made "within one year prior

to the expiration of the original term of copyright," the period for renewal registration in all cases will run from December 31 through December 31.

A special situation arises with respect to subsisting copyrights whose first 28-year term expires during the first year after the act comes into effect. As already explained in connection with section 304(b), if a renewal registration for a copyright of this sort is made before the effective date, the total term is extended to 75 years without the need for a further renewal registration. But, if renewal has not yet been made when the act becomes effective, the period for renewal registration may in some cases be extended for periods of up to a year. If, as the bill provides, the act becomes effective on January 1, 1969, a copyright that was originally secured on March 1, 1941, could have been renewed by virtue of the present statute between March 1, 1968, and December 31, 1968; if not, it can still be renewed under section 304(a) of the new act between January 1, 1969, and December 31, 1969.

SECTION 401. NOTICE ON VISUALLY PERCEPTIBLE COPIES

A requirement that the public be given formal notice of every work in which copyright is claimed was a part of the first U.S. copyright statute enacted in 1790, and since 1802 our copyright laws have always provided that the published copies of copyrighted works must bear a specified notice as a condition of protection. Under the present law the copyright notice requirement serves four principal functions:

- (1) It has the effect of placing in the public domain a substantial body of published material that no one is interested in copyrighting;
- (2) It informs the public as to whether a particular work is copyrighted;
- (3) It identifies the copyright owner;
- (4) It shows the date of publication.

Ranged against these values of a notice requirement are its burdens and unfairness to copyright owners. One of the strongest arguments for revision of the present statute has been the need to avoid the arbitrary and unjust forfeitures now resulting from unintentional or relatively unimportant omissions or errors in the copyright notice. It has been contended that the disadvantages of the notice requirement outweigh its values and that it should therefore be eliminated or substantially liberalized.

The committee has adopted the fundamental principle underlying sections 401 through 405 of the bill, that the copyright notice has real values which should be preserved, and that this be done by inducing use of notice without causing outright forfeiture for errors or omissions. Subject to certain safeguards for innocent infringers, protection would not be lost by the complete omission of copyright notice from large numbers of copies or from a whole edition, if registration for the work is made before or within 5 years after publication. Errors in the name or date in the notice could be corrected without forfeiture of copyright.

Sections 401 and 402 set out the basic notice requirements of the bill, the former dealing with "copies from which the work can be visually perceived," and the latter covering "phonorecords" of a "sound recording." The notice requirements established by these parallel provisions apply only when copies or phonorecords of the work are "pub-

licly distributed." No copyright notice would be required in connection with the public display of a copy by any means, including projectors, television, or cathode ray tubes connected with information storage and retrieval systems, or in connection with the public performance of a work by means of copies or phonorecords, whether in the presence of an audience or through television, radio, computer transmissions, or any other process.

Subsections (a) of both section 401 and section 402 require that a notice be used whenever the work "is published in the United States or elsewhere by authority of the copyright owner." The phrase "or elsewhere," which does not appear in the present law, makes the notice requirements applicable to copies or phonorecords distributed to the public anywhere in the world, regardless of where and when the work was first published. This provision was opposed by various organizations of authors, publishers, and motion picture producers, who argued that it would impose a hardship on American copyright owners since foreign publishers are unfamiliar with U.S. notice requirements and their activities are difficult to control.

The committee has decided to retain the requirement that a notice appear on all copies and phonorecords published abroad on the strength of the factors set out at page 101 of the Register's Supplementary Report. The values of notice are fully applicable to foreign editions of works copyrighted in the United States, especially with the increased flow of intellectual materials across national boundaries, and the gains in the use of notice on editions published abroad under the Universal Copyright Convention should not be wiped out. The consequences of omissions or mistakes with respect to the notice are far less serious under the bill than under the present law, and the committee inserted a new clause in section 404(a) of the 1965 bill to make doubly clear that a copyright owner may guard himself against errors or omissions by others if he makes use of the prescribed notice an express condition of his publishing licenses.

Subsection (b) of section 401, which sets out the form of notice to appear on visually perceptible copies, retains the basic elements of the notice under the present law: the word "Copyright," the abbreviation "Copr.," or the symbol "©"; the year of first publication; and the name of the copyright owner. The year of publication, which is still significant in computing the term and determining the status of a work, is required for all categories of copyrightable works, but clause (2) of subsection (b) makes clear that, in the case of a derivative work or compilation, it is not necessary to list the dates of publication of all preexisting material incorporated in the work. Clause (3) establishes that a recognizable abbreviation or a generally known alternative designation may be used instead of the full name of the copyright owner.

By providing simply that the notice "shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright," subsection (c) follows the flexible approach of the Universal Copyright Convention. Some concern was expressed that this general prescription might lead to subterfuge and confusion. The committee believes, however, that the further provision empowering the Register of Copyrights to set forth in his regulations a list of examples of "specific methods of affixation and positions of the notice on various types of works that will satisfy this requirement" will offer

substantial guidance and avoid a good deal of uncertainty. A notice placed or affixed in accordance with the regulations would clearly meet the requirements but, since the Register's specifications are not to "be considered exhaustive," a notice placed or affixed in some other way might also comply with the law if it were found to "give reasonable notice" of the copyright claim.

SECTION 402. NOTICE ON PHONORECORDS OF SOUND RECORDINGS

A special notice requirement, applicable only to the newly copyrightable subject matter of sound recordings, is established by section 402. Since the bill would protect sound recordings as separate works, independent of protection for any literary or musical works embodied in them, there would be a likelihood of confusion if the same notice requirements applied to sound recordings and to the works they incorporate. Section 402 thus sets forth requirements for a notice to appear on the "phonorecords" of "sound recordings" that are different from the notice requirements established by section 401 for the "copies" of all other types of copyrightable works. Since "phonorecords" are not "copies," there is no need to place a section 401 notice on "phonorecords" to protect the literary or musical works embodied in the records.

In general, the form of the notice specified by section 402(b) consists of: the symbol "©"; the year of first publication of the sound recording; and the name of the copyright owner or an admissible variant. Where the record producer's name appears on the record label, album, sleeve, jacket, or other container, it will be considered a part of the notice if no other name appears in conjunction with it. Under subsection (c), the notice for a copyrighted sound recording may be affixed to the surface, label, or container of the phonorecord "in such manner and location as to give reasonable notice of the claim of copyright."

As explained at page 103 of the Register's Supplementary Report, there are at least three reasons for prescribing use of the symbol "©" rather than "©" in the notice to appear on phonorecords of sound recordings. Aside from the need to avoid confusion between claims to copyright in the sound recording and in the musical or literary work embodied in it, there is also a necessity for distinguishing between copyright claims in the sound recording and in the printed text or art work appearing on the record label, album cover, liner notes, et cetera. The symbol "©" has also been adopted as the international symbol for the protection of sound recordings by the "Neighboring Rights Convention" (the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations, signed at Rome on October 26, 1961). Although the United States has not ratified the convention, there will be cases in which Americans can take advantage of its benefits in foreign countries.

With respect to sound recordings published before its effective date, the bill leaves unresolved the difficult question of whether protection now exists at common law or whether they are all in the public domain. However, in view of the possibility that some published sound recordings may be subject to statutory protection under section 303 of the bill, section 402(d) provides that the notice requirements have no retroactive effect and apply only to phonorecords publicly distributed after the new law takes effect.

SECTION 403. NOTICE FOR CONTRIBUTIONS TO COLLECTIVE WORKS

In conjunction with the provisions of section 201(c), section 403 deals with a troublesome problem under the present law: the notice requirements applicable to contributions published in periodicals and other collective works. The basic approach of the section is threefold:

(1) To permit but not require a separate contribution to bear its own notice;

(2) To make a single notice, covering the collective work as a whole, sufficient to satisfy the notice requirement for the separate contributions it contains, even if they have been previously published or their ownership is different; and

(3) To protect the interests of an innocent infringer of copyright in a contribution that does not bear its own notice, who has dealt in good faith with the person named in the notice covering the collective work as a whole.

As a general rule, under this section, the rights in an individual contribution to a collective work would not be affected by the lack of a separate copyright notice, as long as the collective work as a whole bears a notice. One exception to this rule would apply to "advertisements inserted on behalf of persons other than the owner of copyright in the collective work." Although this exception was opposed by representatives of newspaper publishers, the committee believes that there are good reasons for retaining it. Collective works, notably newspapers and magazines, are major advertising media, and it is common for the same advertisement to be published in a number of different periodicals. The general copyright notice in a particular issue would not ordinarily protect the advertisements inserted in it, and relatively little advertising matter today is published with a separate copyright notice. The exception in section 403(a), under which separate notices would be required for most advertisements published in collective works, would impose no undue burdens on copyright owners and is justified by the special circumstances.

Under section 403(b) a separate contribution that does not bear its own notice, and that is published in a collective work with a general notice containing the name of someone other than the copyright owner of the contribution, is treated as if it has been published with the wrong name in the notice. The case is governed by section 405(a), which means that an innocent infringer who in good faith took a license from the person named in the general notice would be shielded from liability to some extent. Subsection (b) of section 403 was supported by magazine contributors, but was opposed by magazine publishers on the ground that it was likely to induce authors to insist that their contributions bear separate notices. The committee regards the subsection as a reasonable balancing of the equities, and can see advantages to the public, as well as to authors, if separate notices are encouraged.

SECTION 404. OMISSION OF COPYRIGHT NOTICE

Effect of omission on copyright protection

The provisions of section 404(a) make clear that the notice requirements of section 401 and 402 are not absolute and that, unlike the law now in effect, the outright omission of a copyright notice does not

automatically forfeit protection and throw the work into the public domain. This not only represents a major change in the theoretical framework of American copyright law, but it also seems certain to have immediate practical consequences in a great many individual cases. Under the proposed law a work published without any copyright notice will still be subject to statutory protection for at least 5 years, whether the omission was partial or total, unintentional or deliberate.

Under the general scheme of the bill, statutory copyright protection is secured automatically when a work is created, and is not lost when the work is published, even if the copyright notice is omitted entirely. Subsection (a) of section 404 provides that omission of notice, whether intentional or unintentional, does not invalidate the copyright if either of two conditions is met:

- (1) if "no more than a relatively small number" of copies or phonorecords have been publicly distributed without notice; or
- (2) if registration for the work has already been made, or is made within 5 years after the publication without notice, and a reasonable effort is made to add notice to copies or phonorecords publicly distributed in the United States after the omission is discovered.

Thus, if notice is omitted from more than a "relatively small number" of copies or phonorecords, copyright is not lost immediately, but the work will go into the public domain if no effort is made to correct the error or if the work is not registered within 5 years.

The basic approach of section 404(a) has been criticized for opposite reasons. Representatives of librarians and certain users, together with the Department of Justice, have argued that the provision is too lax to induce use of notice and that the deliberate omission of notice should result in immediate forfeiture. In contrast, a statement prepared on behalf of Walt Disney Productions and signed by representatives of various author and music publisher organizations contended that the provisions of section 404(b) protecting innocent infringers where notice is omitted are sufficient to induce use of notice, and that the possibility of eventual forfeiture under section 404(a) is too ruthless; it recommended a statutory provision stating specifically that omission of notice does not invalidate copyright under any circumstances.

The committee has taken the middle-ground approach in the bill as reasonable and as likely to be most effective in encouraging use of a copyright notice without causing unfair and unjustifiable forfeitures on technical grounds. Making the validity of a copyright depend upon whether or not an omission of notice was "deliberate" would introduce a subjective criterion that would result in injustice and confusion.

Clause (1) of section 404(a) provides that, as long as the omission is from "no more than a relatively small number of copies or phonorecords," there is no effect upon the copyright owner's rights except in the case of an innocent infringement covered by section 404(b); there is no need for registration or for efforts to correct the error if this clause is applicable. The phrase "relatively small number" is intended to be less restrictive than the phrase "a particular copy or copies" now in section 21 of the present law, but it means that the

number must be small in an absolute sense as well as in relation to the size of the entire edition. For example, clause (1) would not apply if the notice were omitted from 1,000 copies out of an edition of 100,000, or from 5 copies out of an edition of 10.

Under clause (2) of subsection (a), the first condition for curing an omission from a larger number of copies is that registration be made before the end of 5 years from the defective publication. This registration may have been made before the omission took place or before the work had been published in any form and, since the reasons for the omission have no bearing on the validity of copyright, there would be no need for the application to refer to them. Some time limit for registration is essential and, although the 5-year period provided in the bill has been criticized as too short, the committee has adopted it as reasonable and consistent with the period provided in section 409(c).

The second condition established by clause (2) is that the copyright owner make a "reasonable effort," after discovering the error, to add the notice to copies or phonorecords distributed thereafter. This condition is specifically limited to copies or phonorecords publicly distributed in the United States, since it would be burdensome and impractical to require an American copyright owner to police the activities of foreign licensees in this situation.

The basic notice requirements set forth in sections 401(a) and 402(a) are limited to cases where a work is published "by authority of the copyright owner" and, in prescribing the effect of omission of notice, section 404(a) refers only to omission "from copies or phonorecords publicly distributed by authority of the copyright owner." The intention behind this language is that, where the copyright owner authorized publication of the work, the notice requirements would not be met if copies or phonorecords are publicly distributed without a notice, even if he expected a notice to be used. However, if the copyright owner authorized publication only on the express condition that all copies or phonorecords bear a prescribed notice, the provisions of sections 401 or 402 and of section 404 would not apply since the publication itself would not be authorized. This is an important point, and the committee added a third clause to section 404(a) of the 1965 bill stating the principle directly.

Effect of omission on innocent infringers

In addition to the possibility that copyright protection will be forfeited under section 404(a)(2) if the notice is omitted, a second major inducement to use of the notice is found in subsection (b) of section 404. That provision, which limits the rights of a copyright owner against innocent infringers under certain circumstances, would be applicable whether the notice had been omitted from a large number or from a "relatively small number" of copies. The general postulates underlying the provision are that a person acting in good faith and with no reason to think otherwise should ordinarily be able to assume that a work is in the public domain if there is no notice on an authorized copy or phonorecord and that, if he relies on this assumption, he should be shielded from unreasonable liability.

Subsection (b) in the 1965 bill would have exempted an innocent infringer from liability for damages, either actual or statutory, or for

profits, if he proved he was misled by the omission and "if he undertook the infringement before receiving actual notice that registration for the work had been made." This provision was strongly opposed by a group of author and publisher organizations, whose view was endorsed by the representatives of motion picture producers. This group argued that, since potential infringers are necessarily unknown, it is physically impossible to give actual notice of registration to infringers before they start to infringe, and that a user should at least be required to check the Copyright Office records before relying on the absence of notice. The group recommended deletion of the phrase "receiving actual notice that," an amendment which would have the effect of making an innocent infringer fully liable if his undertaking began after the work had been registered.

The Register of Copyrights, who acknowledged at pages 107 to 108 of his Supplementary Report that section 404(b) of the 1965 bill needed further consideration, characterized the problem as one of—

how to balance the interests: on the one side, the interests of the copyright owner who has registered his claim and tried in good faith to insure use of a notice, and on the other side the interests of the truly innocent infringer (the teacher, the librarian, the newspaper publisher, the television newscaster, etc.) who believes he is entitled to use a work because the only copy he sees contains no notice, and who has no time or facilities for a search in the Copyright Office in every such case.

Instead of the 1965 bill's requirement that notice of registration be served on the infringer before the start of the infringement, and in contrast to the author-publisher group's recommendation that would do away with any requirement of notice to the infringer, the Register advocated an approach that would differentiate "between infringing acts committed before and those committed after actual notice of registration." The committee adopted this approach as the best solution to the problem, and amended section 404(b) accordingly. The committee also accepted the Register's further proposal that, instead of being denied any monetary recovery in this situation, the copyright owner should be entitled to recover "any of the infringer's profits attributable to the infringement," if the court sees fit to award them.

Under section 404(b) of the present bill, an innocent infringer who acts "in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted", and who proves that he was misled by the omission, is shielded from liability for actual or statutory damages with respect to "any infringing acts committed before receiving actual notice" of registration. Thus, where the infringement is completed before actual notice has been served—as would be the usual case with respect to relatively minor infringements by teachers, librarians, journalists, and the like—liability, if any, would be limited to the profits the infringer realized from his act. On the other hand, where the infringing enterprise is one running over a period of time, the copyright owner would be able to seek an injunction against continuation of the infringement, and to obtain full monetary recovery for all infringing acts committed after he had served notice of registration. Persons who undertake major enterprises of this sort should check the Copyright Office registration records before starting, even where copies have been published without notice.

The purpose of the second sentence of subsection (b) of the present bill is to give the courts broad discretion to balance the equities within the framework of section 404. Where an infringer made profits from infringing acts committed innocently before receiving notice from the copyright owner, the court may allow or withhold their recovery in light of the circumstances. The court may enjoin an infringement or may permit its continuation on condition that the copyright owner be paid a reasonable license fee. However, the committee deleted the provision in the 1965 bill for issuance of injunctions on condition that "the infringer be reimbursed for any reasonable expenditure incurred by him," since it is inconsistent with the principle that anyone undertaking a continuing enterprise should be required to consult the registration records in the Copyright Office before making any substantial investment.

Removal of notice by others

Subsection (c) of section 404 involves the situation arising when, following an authorized publication with notice, someone further down the chain of commerce removes, destroys, or obliterates the notice. The courts dealing with this problem under the present law, especially in connection with copyright notices on the selvage of textile fabrics, have generally upheld the validity of a notice that was securely attached to the copies when they left the control of the copyright owner, even though removal of the notice at some later stage was likely. The committee adopted this conclusion, which is incorporated in subsection (c). However, since that subsection has nothing to do with the problem covered by clause (3) of section 404(a)—the situation where the copyright owner authorizes publication and the copies or phonorecords come out without a notice—the committee did not accept the suggestion to add "omission" to the phrase "removal, destruction, or obliteration of the notice."

SECTION 405. ERROR WITH RESPECT TO NAME OR DATE IN NOTICE

In addition to cases where notice has been omitted entirely, it is common under the present law for a copyright notice to be fatally defective because the name or date has been omitted or wrongly stated. Section 405 is intended to avoid technical forfeitures in these cases, while at the same time inducing use of the correct name and date and protecting users who rely on erroneous information. There was no opposition to any of the provisions of section 405 at the hearings, and the committee considers them an effective and reasonable way of dealing with the problem.

Error in name

Section 405(a) begins with a statement that the use of the wrong name in the notice will not affect the validity or ownership of the copyright, and then deals with situations where someone acting innocently and in good faith infringes a copyright by relying on a purported transfer or license from the person erroneously named in the notice. In such a case the innocent infringer is given a complete defense unless a search of the Copyright Office records would have shown that the owner was someone other than the person named in the notice. Use of the wrong name in the notice is no defense if, at

the time infringement was begun, registration had been made in the name of the true owner, or if "a document executed by the person named in the notice and showing the ownership of the copyright had been recorded."

The situation dealt with in section 405 (a) presupposes a contractual relation between the copyright owner and the person named in the notice. The copies or phonorecords bearing the defective notice have been "distributed by authority of the copyright owner" and, unless the publication can be considered unauthorized because of breach of an express condition in the contract or other reasons, the owner must be presumed to have acquiesced in the use of the wrong name. If the person named in the notice grants a license for use of the work in good faith or under a misapprehension, he should not be liable as a copyright infringer, but the last sentence of section 405 (a) would make him liable to account to the copyright owner for all of his gross receipts, subject to deduction of any costs he can justify.

Error in date

The familiar problems of antedated and postdated notices are dealt with in subsection (b) of section 405. In the case of an antedated notice, where the year in the notice is earlier than the year of first publication, the bill adopts the established judicial principle that any statutory term measured from the year of publication will be computed from the year given in the notice. This provision would apply not only to the copyright terms for anonymous works, pseudonymous works, and works made for hire under section 302 (c), but also to the presumptive periods set forth in section 302 (e).

As for postdated notices, subsection (b) provides that, where the year in the notice is more than 1 year later than the year of first publication, the case is treated as if the notice had been omitted and is governed by section 404. Notices postdated by 1 year are quite common on works published near the end of a year, and it would be unnecessarily strict to equate cases of that sort with works published without notice of any sort.

Omission of name or date

Section 405 (c) provides that, if the copies or phonorecords "contain no name or no date that could reasonably be considered a part of the notice," the result is the same as if the notice had been omitted entirely, and section 404 controls. Unlike the present law, the bill contains no provision requiring the elements of the copyright notice to "accompany" each other, and under section 405 (c) a name or date that could reasonably be read with the other elements may satisfy the requirements even if somewhat separated from them. Direct contiguity or juxtaposition of the elements is no longer necessary; but if the elements are too widely separated for their relation to be apparent, or if uncertainty is created by the presence of other names or dates, the case would have to be treated as if the name or date, and hence the notice itself, had been omitted altogether.

SECTION 406. DEPOSIT FOR THE LIBRARY OF CONGRESS

The provisions of section 406 through 411 of the bill mark another departure from the present law. Under the 1909 statute, deposit of copies for the collections of the Library of Congress and deposit of

copies for purposes of copyright registration have been treated as the same thing. The bill's basic approach is to regard deposit and registration as separate though closely related: deposit of copies or phonorecords for the Library of Congress is mandatory, but exceptions can be made for material the Library neither needs nor wants; copyright registration is not generally mandatory, but is a condition of certain remedies for copyright infringement. Deposit for the Library of Congress can be, and in the bulk of cases undoubtedly will be, combined with copyright registration. The content and language of sections 406 through 411 of the 1965 bill gained wide acceptance and, except for one minor amendment to section 408, adopted by the committee without change.

The basic requirement of the deposit provision, section 406, is that within 3 months after a work has been published with notice of copyright in the United States, the "owner of copyright or of the exclusive right of publication" must deposit two copies or phonorecords of the work in the Copyright Office. The Register of Copyrights is authorized to exempt any category of material from the deposit requirements. Where the category is not exempted and deposit is not made, the Register may demand it; failure to comply would be penalized by a fine.

Under the present law deposit for the Library of Congress must be combined with copyright registration, and failure to comply with a formal demand for deposit and registration results in complete loss of copyright. Under section 406 of the bill, the deposit requirements can be satisfied without ever making registration, and subsection (a) makes clear that deposit "is not a condition of copyright protection." Some concern has been expressed as to whether the imposition of a fine is alone a strong enough sanction to produce the deposits that are needed for the Library of Congress, but the committee does not share these misgivings. A realistic fine, coupled with the increased inducements for voluntary registration and deposits under other sections of the bill, seems likely to produce a more effective deposit system than the present one. The bill's approach will also avoid the danger that, under a divisible copyright, one copyright owner's rights could be destroyed by another owner's failure to deposit.

Although the deposit requirements are limited to works "published with notice of copyright in the United States," they would become applicable as soon as a work first published abroad is published in this country through the distribution of copies or phonorecords that are either imported or are part of an American edition. With respect to all types of works other than sound recordings, the basic obligation is to deposit "two complete copies of the best edition"; the term "best edition," as defined in section 101, makes clear that the Library of Congress is entitled to receive copies or phonorecords from the edition it believes best suits its needs, regardless of the quantity or quality of other U.S. editions that may also have been published before the time of deposit. Once the deposit requirements for a particular work have been satisfied under section 406, however, the Library cannot claim deposit of future editions unless they represent newly copyrightable works under section 103.

The deposit requirement for sound recordings includes "two complete phonorecords of the best edition" and any other visually per-

ceptible material published with the phonorecords. The reference here is to the text or pictorial matter appearing on record sleeves and album covers or embodied in separate leaflets or booklets included in a sleeve, album, or other container. The required deposit in the case of a sound recording would extend to the entire "package" and not just to the disk, tape, or other phonorecord included as part of it.

Deposits under section 406, although made in the Copyright Office, are "for the use or disposition of the Library of Congress." Thus, the fundamental criteria governing regulations issued under section 406(c), which allows exemptions from the deposit requirements for certain categories of works, would be the needs and wants of the Library. The purpose of this provision is to make the deposit requirements as flexible as possible, so that there will be no obligation to make deposit where it serves no purpose, so that only one copy or phonorecord may be deposited where two are not needed, and so that reasonable adjustments can be made to meet practical needs in special cases. The regulations, in establishing special categories for these purposes, would necessarily balance the value of the copies or phonorecords to the collections of the Library of Congress against the burdens and costs to the copyright owner of providing them.

If, within 3 months after the Register of Copyrights has made a formal demand for deposit in accordance with section 406(d), the person on whom the demand was made has not complied, he becomes liable to a fine of up to \$250 for each work, plus the "total retail price of the copies or phonorecords demanded." If no retail price has been fixed, clause (2) of subsection (d) establishes the additional amount as "the reasonable cost to the Library of Congress of acquiring them." Thus, where the copies or phonorecords are not available for sale through normal trade channels—as would be true of many motion picture firms, video tapes, and computer tapes, for example—the item of cost to be included in the fine would be equal to the basic expense of duplicating the copies or phonorecords plus a reasonable amount representing what it would have cost the Library to obtain them under its normal acquisitions procedures, if they had been available.

SECTION 407. COPYRIGHT REGISTRATION IN GENERAL

Permissive registration

Under section 407(a), registration of a claim to copyright in any work, whether published or unpublished, can be made voluntarily by "the owner of copyright or of any exclusive right in the work" at any time during the copyright term. The claim may be registered in the Copyright Office by depositing the copies, phonorecords, or other material specified by subsections (b) and (c), together with an application and fee. Except where, under section 404(a), registration is made to preserve a copyright that would otherwise be invalidated because of omission of the notice, registration is not a condition of copyright protection.

Deposit for purpose of copyright registration

In general, and subject to various exceptions, the material to be deposited for copyright registration consists of one complete copy or phonorecord of an unpublished work, and two complete copies or

phonorecords of the best edition in the case of a published work. Section 407(b) provides special deposit requirements in the case of a work first published abroad ("one complete copy or phonorecord as so published") and in the case of a contribution to a collective work ("one complete copy or phonorecord of the best edition of the collective work"). The latter requirement was criticized as overly burdensome, and it was recommended that clause (4) of section 407(b) call for deposit of no more than a copy or phonorecord of the contribution itself. As a general rule, however, the deposit of more than a tear sheet or similar fraction of a collective work is needed to identify the contribution properly and to show the form in which it was published. Where, as in the case of collective works such as multi-volume encyclopedias, multipart newspaper editions, and works that are rare or out of print, the regulations issued by the Register under section 407(c) can be expected to make exceptions or special provisions.

With respect to works published in the United States, a single deposit could be used to satisfy the deposit requirements of section 406 and the registration requirements of section 407, if the application and fee for registration are submitted at the same time and are accompanied by "any additional identifying material" required by regulations. To serve this dual purpose the deposit and registration would have to be made simultaneously; if a deposit under section 406 had already been made, an additional deposit would be required under section 407. In addition, since deposit for the Library of Congress and registration of a claim to copyright serve essentially different functions, section 407(b) authorizes the Register of Copyrights to issue regulations under which deposit of additional material, needed for identification of the work in which copyright is claimed, could be required in certain cases.

Administrative classification

As explained at page 119 of the Register's Supplementary Report, it is important that the statutory provisions setting forth the subject matter of copyright be kept entirely separate from any classification of copyrightable works for practical administrative purposes. Section 407(c) thus leaves it to the Register of Copyrights to specify "the administrative classes into which works are to be placed for purposes of deposit and registration," and makes clear that this administrative classification "has no significance with respect to the subject matter of copyright or the exclusive rights provided by this title."

Optional deposit

Consistent with the principle of administrative flexibility underlying all of the deposit and registration provisions, subsection (c) of section 407 also gives the Register latitude in adjusting the type of material deposited to the needs of the registration system. He is authorized to issue regulations specifying "the nature of the copies or phonorecords to be deposited in the various classes" and, for particular classes, to require or permit deposit of identifying material rather than copies or phonorecords, deposit of one copy or phonorecord rather than two, or, in the case of a group of related works, a single rather than a number of separate registrations. Under this provision the Register could, where appropriate, permit deposit of phonorecords rather than notated copies of musical compositions, allow

or require deposit of print-outs of computer programs under certain circumstances, or permit deposit of one volume of an encyclopedia for purposes of registration of a single contribution.

Where the copies or phonorecords are bulky, unwieldy, easily broken, or otherwise impractical to file and retain as records identifying the work registered, the Register would be able to require or permit the substitute deposit of material that would better serve the purpose of identification. Cases of this sort might include, for example, billboard posters, toys and dolls, ceramics and glassware, costume jewelry, and a wide range of three-dimensional objects embodying copyrighted material. The Register's authority would also extend to rare or extremely valuable copies which would be burdensome or impossible to deposit. Deposit of one copy or phonorecord rather than two would probably be justifiable in the case of most motion pictures, and in any case where the Library of Congress has no need for the deposit and its only purpose is identification.

The provision empowering the Register to allow a number of related works to be registered together as a group represents a needed and important liberalization of the law now in effect. At present the requirement for separate registrations where related works or parts of a work are published separately has created administrative problems and has resulted in unnecessary burdens and expenses on authors and other copyright owners. In a number of cases the technical necessity for separate applications and fees has caused copyright owners to forgo copyright altogether. Examples of cases where these undesirable and unnecessary results could be avoided by allowing a single registration include the various editions or issues of a daily newspaper, a work published in serial installments, a group of related jewelry designs, a group of photographs by one photographer, a series of greeting cards related to each other in some way, or a group of poems by a single author.

Corrections and amplifications

Another unsatisfactory aspect of the present law is the lack of any provision for correcting or amplifying the information given in a completed registration. Subsection (d) of section 407 would remedy this by authorizing the Register to establish "formal procedures for the filing of an application for supplementary registration," in order to correct an error or amplify the information in a copyright registration. The "error" to be corrected under subsection (d) is an error by the applicant that the Copyright Office could not have been expected to note during its examination of the claim; where the error in a registration is the result of the Copyright Office's own mistake or oversight, the Office can make the correction on its own initiative and without recourse to the "supplementary registration" procedure.

Under subsection (d), a supplementary registration is subject to payment of a separate fee and would be maintained as an independent record, separate and apart from the record of the earlier registration it is intended to supplement. However, it would be required to identify clearly "the registration to be corrected or amplified" so that the two registrations could be tied together by appropriate means in the Copyright Office records. For the reasons given at pages 120-121 of the Register's Supplementary Report, the original registration would not

be expunged or cancelled; as stated in the subsection: "The information contained in a supplementary registration augments but does not supersede that contained in the earlier registration."

Published edition of previously registered work

The present statute requires that, where a work is registered in unpublished form, it must be registered again when it is published, whether or not the published edition contains any new copyrightable material. Under the bill there would be no need to make a second registration for the published edition unless it contains sufficient added material to be considered a "derivative work" or "compilation" under section 103.

On the other hand, there will be a number of cases where the copyright owner, although not required to do so, would like to have registration made for his published edition, especially since he will still be obliged to deposit copies or phonorecords of it in the Copyright Office under section 406. From the point of view of the public there are advantages in allowing him to do so, since registration for the published edition will put on record the facts about the work in the form in which it is actually distributed to the public. Accordingly, section 407(e), which is intended to accomplish this result, makes an exception to the general rule against allowing more than one registration for the same work.

SECTION 408. APPLICATION FOR REGISTRATION

The various clauses of section 408, which specify the information to be included in an application for copyright registration, are intended to give the Register of Copyrights authority to elicit all of the information needed to examine the application and to make a meaningful record of registration. The list of enumerated items is not exhaustive; under the last clause of the section the application may also include "any other information regarded by the Register of Copyrights as bearing upon the preparation or identification of the work or the existence, ownership, or duration of the copyright."

Among the enumerated items there are several that are not now included in the Copyright Office's application forms, but will become significant under the life-plus-50 term and other provisions of the bill. Clause (5), reflecting the increased importance of the interrelationship between registration of copyright claims and recordation of transfers of ownership, requires a statement of how a claimant who is not the author acquired ownership of the copyright. The catchall clause at the end of the section will enable the Register to obtain more specialized information, such as that bearing on whether the work contains material that is a "work of the United States Government." The same might have been true, under the 1965 bill with respect to compliance with the manufacturing requirement of section 601. However, in line with its amendments of that section, the committee added a new clause to section 408 specifying, in the case of works subject to the manufacturing requirement, that the application include information about the manufacture of the copies.

SECTION 409. REGISTRATION OF CLAIM AND ISSUANCE OF CERTIFICATE

The first two subsections of section 409 set forth the two basic duties of the Register of Copyrights with respect to copyright registration: (1) to register the claim and issue a certificate if he determines that "the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met," and (2) to refuse registration and notify the applicant if he determines that "the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason."

Subsection (c) deals with the probative effect of a certificate of registration issued by the Register under subsection (a). Under its provisions, a certificate is required to be given prima facie weight in any judicial proceedings if the registration it covers was made "before or within five years after first publication of the work"; thereafter the court is given discretion to decide what evidentiary weight the certificate should be accorded. This 5-year period, to which no objection was lodged at the hearings, recognizes that the longer the lapse of time that takes place between publication and registration the less likely to be reliable are the facts stated in the certificate.

Under section 409(c), a certificate is to "constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate." Although the principle that a certificate represents prima facie evidence of copyright validity has been established in a long line of court decisions, the American Bar Association adopted a position opposing its explicit recognition in the new statute. Nevertheless, the committee has retained the provision, not only because it believes that it is an accurate statement of the present law but also because it believes the principle is a sound one. It is true that, unlike a patent claim, a claim to copyright is not examined for basic validity before a certificate is issued. On the other hand, endowing a copyright claimant who has obtained a certificate with a rebuttable presumption of the validity of his copyright does not deprive the defendant in an infringement suit of any rights; it merely orders the burdens of proof. The plaintiff should not ordinarily be forced in the first instance to prove all of the multitude of facts that underlie the validity of his copyright unless the defendant, by effectively challenging them, shifts the burden to him to do so.

Section 409(d), which is in accord with the present practice of the Copyright Office, makes the effective date of registration the day when an application, deposit, and fee, "which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration," have all been received. Where the three necessary elements are received at different times, the date of receipt of the last of them is controlling, regardless of when the Copyright Office acts on the claim. The provision not only takes account of the inevitable timelag between receipt of the application and other material and the issuance of the certificate, but it also recognizes the possibility that a court might later find the Register wrong in refusing registration.

SECTION 410. REGISTRATION AS PREREQUISITE TO INFRINGEMENT SUIT

The first sentence of section 410 restates the present statutory requirement that registration must be made before a suit for copyright infringement is instituted. Under the bill, as under the law now in effect, a copyright owner who has not registered his claim can have a valid cause of action against someone who has infringed his copyright, but he cannot enforce his rights in the courts until he has made registration.

The second and third sentences of section 410 would alter the present law as interpreted in *Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co.*, 260 F. 2d 637 (2d Cir. 1958). That case requires an applicant, who has sought registration and has been refused, to bring an action against the Register of Copyrights to compel the issuance of a certificate, before he can bring suit against an infringer. Under section 410, a rejected claimant who has properly applied for registration may maintain an infringement suit if he serves notice of it on the Register of Copyrights. The Register is authorized, though not required, to enter the suit within 60 days; he would be a party on the issue of registrability only, and his failure to join the action would "not deprive the court of jurisdiction to determine that issue."

The Department of Justice recommended that the last two sentences of section 410 be deleted on the ground that they might lead to baseless suits and harassment, unnecessarily burdening defendants and placing the Register of Copyrights in the position of being a party in private litigation. On the other hand, the principle of the bill on this point has been endorsed by the American Bar Association and the American Patent Law Association, among others, and the Register of Copyrights favors it on both administrative and policy grounds. The committee considers it a fair and reasonable solution, in keeping with the principles underlying the entire bill.

SECTION 411. REGISTRATION AS PREREQUISITE TO CERTAIN REMEDIES

Although section 411 was at one time the subject of considerable dispute, it now appears to have gained general acceptance. The need for the section arises from two basic changes the bill will make in the present law:

(1) Copyright registration for published works, which is useful and important to users and the public at large, would no longer be compulsory, and should therefore be induced in some practical way.

(2) The great body of unpublished works now protected at common law would automatically be brought under copyright and given statutory protection. The remedies for infringement presently available at common law protection should continue to apply to these works under the statute, but they should not be given special statutory remedies unless the owner has, by registration, made a public record of his copyright claim.

Under the general scheme of the bill, a copyright owner whose work has been infringed before registration would be entitled to the remedies ordinarily available in infringement cases: an injunction on terms the court considers fair, and his actual damages plus any applica-

ble profits not used as a measure of damages. However, section 411 would deny any award of the special or "extraordinary" remedies of statutory damages or attorney's fees where infringement of copyright in an unpublished work began before registration or where, in the case of a published work, infringement commenced after publication and before registration (unless registration has been made within a grace period of 3 months after publication). These provisions would be applicable to works of foreign and domestic origin alike.

In providing that statutory damages and attorney's fees are not recoverable for infringement of unpublished, unregistered works, clause (1) of section 411 in no way narrows the remedies available under the present law. With respect to published works, clause (2) would generally deny an award of those two special remedies where infringement takes place before registration. As an exception, however, the clause provides a grace period of 3 months after publication during which registration can be made without loss of remedies; full remedies could be recovered for any infringement begun during the 3 months after publication if registration is made before that period has ended. This exception is needed to take care of newsworthy or suddenly popular works which may be infringed almost as soon as they are published, before the copyright owner has had a reasonable opportunity to register his claim.

SECTION 501. INFRINGEMENT OF COPYRIGHT

The bill, unlike the present law, contains a general statement of what constitutes infringement of copyright. Section 501(a) identifies a copyright infringer as someone who "violates any of the exclusive rights of the copyright owner as provided by sections 106 through 116" of the bill, or who imports copies or phonorecords in violation of section 602. Under the latter section an unauthorized importation of copies or phonorecords acquired abroad is an infringement of the exclusive right of distribution under certain circumstances.

The principle of the divisibility of copyright ownership, established by section 201(d), carries with it the need in infringement actions to safeguard the rights of all copyright owners and to avoid a multiplicity of suits. Subsection (b) of section 501 enables the owner of a particular right to bring an infringement action in his own name alone, while at the same time insuring to the extent possible that the other owners whose rights may be affected are notified and given a chance to join the action.

The first sentence of subsection (b) empowers the "legal or beneficial owner of an exclusive right" to bring suit for "any infringement of that particular right committed while he is the owner of it." A "beneficial owner" for this purpose would include, for example, an author who had parted with his legal title to the copyright in exchange for percentage royalties based on sales or license fees.

The second and third sentences of section 501(b), which supplement the provisions of the Federal Rules of Civil Procedure, give the courts discretion to require the plaintiff to serve notice of his suit on "any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright"; where a person's interest "is likely to be affected by a decision in the case" a court order re-

quiring service of notice is mandatory. As under the Federal rules, the court has discretion to require joinder of "any person having or claiming an interest in the copyright"; but, if any such person wishes to become a party, the court must permit his intervention.

SECTION 502. INJUNCTIONS

Section 502(a) reasserts the discretionary power of courts to grant injunctions and restraining orders, whether "preliminary," "temporary," "interlocutory," "permanent," or "final," to prevent or stop infringements of copyright. This power is made subject to the provisions of section 1498 of title 28, dealing with infringement actions against the United States. The latter reference in section 502(a) makes it clear that the bill would not permit the granting of an injunction against an infringement for which the Federal Government is liable under section 1498.

Under subsection (b), which is the counterpart of provisions in sections 112 and 113 of the present statute, a copyright owner who has obtained an injunction in one State will be able to enforce it against a defendant located anywhere else in the United States.

SECTION 503. IMPOUNDING AND DISPOSITION OF INFRINGING ARTICLES

The two subsections of section 503 deal respectively with the courts' power to impound allegedly infringing articles during the time an action is pending, and to order the destruction or other disposition of articles found to be infringing. In both cases the articles affected include "all copies or phonorecords" which are claimed or found "to have been made or used in violation of the copyright owner's exclusive rights," and also "all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced." The alternative phrase "made or used" in both subsections enables a court to deal as it sees fit with articles which, though reproduced and acquired lawfully, have been used for infringing purposes such as rentals, performances, and displays.

Articles may be impounded under subsection (a) "at any time while an action under this title is pending," thus permitting seizure of articles alleged to be infringing as soon as suit has been filed and without waiting for an injunction. The provision in the same subsection, empowering the court to order impounding "on such terms as it may deem reasonable," has been criticized by motion picture producers as imprecise; they argued that the problems of seizure and impounding in copyright cases are specialized, and that the detailed rules established by the U.S. Supreme Court under the present law have proved effective and should not be abandoned. The present Supreme Court rules were issued even though there is no specific provision authorizing them in the copyright statute. Without deciding whether there should be separate rules governing impounding practice in all copyright cases, the committee found no need for including a special provision on the point in the bill.

Under section 101(d) of the present statute, articles found to be infringing may be ordered to be delivered up for destruction. Section 503(b) of the bill would make this provision more flexible by giving the court discretion to order "destruction or other reasonable disposition" of the articles found to be infringing. Thus, as part of its final judgment or decree, the court could order the infringing articles sold, delivered to the plaintiff, or disposed of in some other way that would avoid needless waste and best serve the ends of justice.

SECTION 504. DAMAGES AND PROFITS

In general

A cornerstone of the remedies sections and of the bill as a whole is section 504, the provision dealing with recovery of actual damages, profits, and statutory damages. The two basic aims of this section are reciprocal and correlative: (1) to give the courts specific unambiguous directions concerning monetary awards, thus avoiding the confusion and uncertainty that have marked the present law on the subject, and, at the same time, (2) to provide the courts with reasonable latitude to adjust recovery to the circumstances of the case, thus avoiding some of the artificial or overly technical awards resulting from the language of the existing statute.

Subsection (a) lays the groundwork for the more detailed provisions of the section by establishing the liability of a copyright infringer for either "the copyright owner's actual damages and any additional profits of the infringer," or statutory damages. Recovery of actual damages and profits under section 504(b) or of statutory damages under section 504(c) is alternative and for the copyright owner to elect; as under the present law, the plaintiff in an infringement suit is not obliged to submit proof of damages and profits if he chooses to rely on the provision for minimum statutory damages. However, there is nothing in section 504 to prevent a court from taking account of evidence concerning actual damages and profits in making an award of statutory damages within the range set out in subsection (c).

Actual damages and profits

In allowing the plaintiff to recover "the actual damages suffered by him as a result of the infringement," plus any of the infringer's profits "that are attributable to the infringement and are not taken into account in computing the actual damages," section 504(b) recognizes the different purposes served by awards of damages and profits. Damages are awarded to compensate the copyright owner for his losses from the infringement, and profits are awarded to prevent the infringer from unfairly benefiting from his wrongful act. Where the defendant's profits are nothing more than a measure of the damages suffered by the copyright owner, it would be inappropriate to award damages and profits cumulatively, since in effect they amount to the same thing. However, in cases where the copyright owner has suffered damages not reflected in the infringer's profits, or where there have been profits attributable to the copyrighted work but not used as a measure of damages, subsection (b) authorizes the award of both.

The language of the subsection makes clear that only those profits "attributable to the infringement" are recoverable; where some of the

defendant's profits result from the infringement and other profits are caused by different factors, it will be necessary for the court to make an apportionment. However, the burden of proof is on the defendant in these cases; in establishing profits the plaintiff need prove only "the infringer's gross revenue," and the defendant must prove not only "his deductible expenses" but also "the elements of profit attributable to factors other than the copyrighted work."

Statutory damages

The committee amended subsection (c) of section 504 in the 1965 bill to make clear that the plaintiff's election to recover statutory damages may take place at any time during the trial before the court has rendered its final judgment. The remainder of clause (1) of the subsection represents a statement of the general rules applicable to awards of statutory damages. Its principal provisions may be summarized as follows:

1. As a general rule, where the plaintiff elects to recover statutory damages, the court is obliged to award between \$250 and \$10,000. It can exercise discretion in awarding an amount within that range but, unless one of the exceptions provided by clause (2) is applicable, it cannot make an award of less than \$250 or of more than \$10,000 if the copyright owner has chosen recovery under section 504(c).

2. Although, as explained below, an award of minimum statutory damages may be multiplied if separate works and separately liable infringers are involved in the suit, a single award in the \$250 to \$10,000 range is to be made "for all infringements involved in the action." A single infringer of a single work is liable for a single amount between \$250 and \$10,000, no matter how many acts of infringement are involved in the action and regardless of whether the acts were separate, isolated, or occurred in a related series.

3. Where the suit involves infringement of more than one separate and independent work, minimum statutory damages for each work must be awarded. For example, if one defendant has infringed three copyrighted works, the copyright owner is entitled to statutory damages of at least \$750 and may be awarded up to \$30,000. Subsection (c)(1) makes clear, however, that, although they are regarded as independent works for other purposes, "all the parts of a compilation or derivative work constitute one work" for this purpose. Moreover, although the minimum and maximum amounts are to be multiplied where multiple "works" are involved in the suit, the same is not true with respect to multiple copyrights, multiple owners, multiple exclusive rights, or multiple registrations. This point is especially important since, under a scheme of divisible copyright, it is possible to have the rights of a number of owners of separate "copyrights" in a single "work" infringed by one act of a defendant.

4. Where the infringements of one work were committed by a single infringer acting individually, a single award of statutory damages would be made. Similarly, where the work was infringed by two or more joint tortfeasors, the bill would make them jointly and severally liable for an amount in the \$250 to

\$10,000 range. However, where separate infringements for which two or more defendants are not jointly liable are joined in the same action, separate awards of statutory damages would be appropriate.

In the 1965 bill, clause (2) of section 504(c) provided for exceptional cases in which the maximum award of statutory damages could be raised from \$10,000 to \$20,000, and in which the minimum recovery could be reduced from \$250 to \$100. The committee adopted these amounts, together with the basic principle that the courts should be given discretion to increase statutory damages in cases of willful infringement and to lower the minimum where the infringer is innocent. The language of the clause was amended to make clear not only that the burden of proving willfulness rests on the copyright owner and that of proving innocence rests on the infringer, but also that the court must make a finding of either willfulness or innocence in order to award the exceptional amounts.

Another committee amendment to the 1965 bill will allow recovery of up to \$20,000 in statutory damages where "the infringement was committed willfully,"; the present bill no longer requires added proof that infringement took place "after service upon the infringer of a written notice to desist." Written notice will still be persuasive evidence of willfulness, of course, but the committee believes that the court should have discretion to increase the maximum award in cases where the infringer, though never having received actual notice of the copyright owner's rights, nevertheless acted in willful disregard of them.

The "innocent infringer" provision of section 504(c) (2) of the 1965 bill was the subject of extensive discussion. Opinion on the exception, which would allow reduction of minimum statutory damages to \$100 where the infringer "was not aware and had no reason to believe that his acts constituted an infringement of copyright," ranged from opposition to any exception to proposals to give the courts unlimited discretion to withhold statutory damages for innocent infringement, and included various intermediate positions.

After full consideration the committee adopted the basic "innocent infringer" provision as it stands. On the one hand it is sufficient to protect against unwarranted liability in cases of occasional or isolated innocent infringement, and it offers adequate insulation to users, such as broadcasters and newspaper publishers, who are particularly vulnerable to this type of infringement suit. On the other hand, by establishing a realistic floor for liability, the provision preserves its intended deterrent effect; and it would not allow a defendant to escape simply because the plaintiff failed to disprove his claim of innocence.

At the same time, while retaining the "innocent infringer" provision the committee added a new exception to clause (2) of the 1965 bill to deal with the special situation of teachers who reproduce copyrighted material for classroom use in the honest belief that what they are doing constitutes fair use. In cases of this sort it would be possible for the court to find that "an instructor in a nonprofit educational institution" had infringed and still reduce the statutory minimum or waive it altogether. This exception applies only where the defendant intended to use the reproductions "in the course of face-to-face teaching activities in a classroom or similar place," and where he proves

“that he believed and had reasonable grounds for believing that the reproduction was a fair use under section 107.” It reflects the special problems of educational and scholarly uses of copyrighted material discussed in connection with that section.

SECTIONS 505 THROUGH 508. MISCELLANEOUS PROVISIONS ON INFRINGEMENT AND REMEDIES

The remaining sections of chapter 5 of the bill, dealing with costs and attorney's fees, criminal offenses, the statute of limitations, and notification of copyright actions, are discussed in some detail at pages 138-140 of the Register's Supplementary Report, and elicited no opposition or comment at the hearings.

Under section 505 the awarding of costs and attorney's fees are left to the court's discretion, and the section also makes clear that neither costs nor attorney's fees can be awarded to or against “the United States or an officer thereof.” Four types of criminal offenses actionable under the bill are listed in section 506: willful infringement for profit, fraudulent use of a copyright notice, fraudulent removal of notice, and false representation in connection with a copyright application. In each case the maximum fine on conviction has been increased to \$2,500 and in conformity with the general pattern of the Criminal Code (18 U.S.C.), no minimum fines have been provided. In addition to or instead of a fine, conviction for criminal infringement under section 506(a) can carry with it a sentence of imprisonment of up to 1 year; and, where the offense is repeated, the defendant may be fined up to \$10,000 or imprisoned up to 3 years, or both.

Section 507, which is substantially identical with section 115 of the present law, establishes a 3-year statute of limitations for both criminal proceedings and civil actions. The language of this section, which was adopted by the act of September 7, 1957 (71 Stat. 633), represents a reconciliation of views, and has therefore been left unaltered. Section 508, which corresponds to some extent with a provision in the patent law (35 U.S.C. sec. 290), is intended to establish a method for notifying the Copyright Office and the public of the filing and disposition of copyright cases. The clerks of the Federal courts are to notify the Copyright Office of the filing of any copyright actions and of their final disposition, and the Copyright Office is to make these notifications a part of its public records.

SECTION 601. MANUFACTURING REQUIREMENT

The requirement in general

A chronic problem in efforts to revise the copyright statute for the past 75 years has been the need to reconcile the interests of the American printing industry with those of authors and other copyright owners. The scope and impact of the “manufacturing clause,” which came into the copyright law as a compromise in 1891, have been gradually narrowed by successive amendments. The basic problem is still unresolved, however, and section 601 of the 1965 bill was a major point of controversy at the hearings.

Under the present statute, with many exceptions and qualifications, a book or periodical in the English language must be manufactured in the United States in order to receive full copyright protection.

Failure to comply with any of the complicated requirements can result in complete loss of protection. Today the main effects of the manufacturing requirements are on works by American authors.

The first and most important question the committee had to decide was whether the manufacturing requirement should be retained in the statute in any form. The Register of Copyrights, whose 1961 Report had recommended outright repeal, made clear that he still favors this result in principle; however, if economic factors have not changed sufficiently to permit dropping the requirement entirely, he urged that it be "substantially narrowed so that rights are not destroyed in situations where the book manufacturing industry has no real need of protection." A number of witnesses at the hearings similarly expressed a preference for outright elimination of the manufacturing clause, but with qualifications suggesting support for a provision ameliorating the present law.

These and other recommendations for further amendments of section 601 of the 1965 bill suggested the possibility of compromise. In fact, as the record of the hearings shows, serious efforts at compromising the issue were made by various interests during 1965; although these efforts apparently broke down over the "reproduction proofs" issue, to be discussed below, they produced some areas of agreement that were reflected during the testimony. The committee, while recognizing that no formal compromise was achieved, nevertheless took these indications of rapprochement into account in its amendments of section 601 in the 1965 bill.

An impressively broad range of organizations and interests, spearheaded by various groups of authors and book publishers, supported elimination of the manufacturing requirement on grounds of economics and public policy. Their principal arguments can be summarized as follows:

1. The manufacturing clause originated as a response to a historical situation that no longer exists. Its requirements have gradually been relaxed over the years, and the results of the 1954 amendment, which partially eliminated it, have borne out predictions of positive economic benefits for all concerned, including printers, printing trades union members, and the public.

2. Even as rewritten, section 601 of the 1965 bill places unjustified burdens on the American author, who is treated as a hostage. It hurts the author most where it benefits the manufacturer least: in cases where the author must publish abroad or not at all. It unfairly discriminates between American authors and other authors, and between authors of books and authors of other works.

3. The modifications in the 1965 bill are desirable as far as they go, but they still violate the basic principle that an author's rights should not be dependent on the circumstances of manufacture, and they still fail to settle the uncertain status of reproduction proofs, the major practical problem under the present law. In addition to solving that problem, complete repeal would substantially reduce friction with foreign authors and publishers, increase opportunities for American authors to have their works published, encourage international publishing ventures, and eliminate the

tangle of procedural requirements now burdening authors, publishers, the Copyright Office, and the Bureau of Customs.

4. Studies prove that the economic fears of the printing industry and unions are unfounded. The vast bulk of American titles are completely manufactured in the United States, and U.S. exports of printed matter are much greater than imports. The American book manufacturing industry is healthy and growing, to the extent that it cannot keep pace with its orders. There are increasing advantages to domestic manufacture because of improved technology, and because of the delays, inconveniences, and other disadvantages of foreign manufacture. Even with repeal, foreign manufacturing would be confined to small editions and scholarly works, some of which could not be published otherwise.

With some differences in emphasis, all witnesses representing segments of the U.S. printing industry, including printing trades unions, book manufacturers, and typographers, expressed themselves as strongly opposed to outright repeal and generally in favor of section 601 in the 1965 bill. The following were their principal arguments:

1. The historical reasons for the manufacturing clause were valid originally and still are. It is unrealistic to speak of this as a "free trade" issue or of tariffs as offering any solution, since book tariffs have been minimal and are being removed entirely; the manufacturing requirement remains a reasonable and justifiable condition to the granting of a monopoly. There is no problem of international comity, since only works by American authors are affected by section 601. Foreign countries have many kinds of import barriers, currency controls, and similar restrictive devices comparable to a manufacturing requirement.

2. The differentials between U.S. and foreign wage rates in book production are extremely broad and are not diminishing; Congress should not create a condition whereby work can be done under the most degraded working conditions in the world, be given free entry, and thus exclude American manufacturers from the market. The manufacturing clause has been responsible for a strong and enduring industry. Repeal would destroy small businesses, bring chaos to the industry, and catch manufacturers, whose labor costs and break-even points are extremely high, in a cost-price squeeze at a time when expenditures for new equipment have reduced profits to a minimum.

3. The high ratio of exports to imports could change very quickly without a manufacturing requirement. Repeal would add to the balance-of-payments deficit since foreign publishers never manufacture here. The U.S. publishing industry has large investments abroad, and attacks on the manufacturing clause by foreign publishers show a keen anticipation for new business. The book publishers' arguments that repeal would have no real economic impact are contradicted by their arguments that the manufacturing requirement is stifling scholarship and crippling publishing; their own figures show a 250 percent rise in English-language book imports in 10 years.

After balancing these contradictory arguments, the committee concluded that, although there is no justification on principle for a manufacturing requirement in the copyright statute, there may still be some economic justification for it. Section 601 of the present bill represents a substantial liberalization that will remove many of the inequities of the present manufacturing requirement. The real issue that lies between section 601 and complete repeal is an economic one, and on purely economic grounds the possible dangers to the American printing industry in removing all restrictions on foreign manufacture outweigh the possible benefits repeal would bring to American authors and publishers.

The committee is aware that the concern on both sides is not so much with the present but with the future; and, because new machines and devices for reproducing copyrighted text matter are presently in a stage of rapid development, the future in this area is unpredictable. Outright repeal of the manufacturing requirement should be accomplished as soon as it can be shown convincingly that the effects on the U.S. printing industry as a whole would not be serious. Meanwhile the best approach lies in the compromise embodied in section 601 of the present bill.

Works subject to the manufacturing requirement

The scope of the manufacturing requirement, as set out in subsections (a) and (b) of section 601, is considerably more limited than that of present law. The requirements would apply only to "a work consisting preponderantly of nondramatic literary material that is in the English language and is protected under this title," and would thus not extend to: dramatic, musical, pictorial, or graphic works; foreign-language, bilingual, or multilingual works; public domain material; or works consisting preponderantly of material that is not subject to the manufacturing requirement. Even where a work is subject to the requirement, the only portions that need to be manufactured in the United States are those consisting of copyrighted "nondramatic literary material" in English. Thus, for example, the illustrations in a book could be manufactured abroad without affecting their copyright status, whether or not domestic manufacture was required for the text.

In the 1965 bill, clause (1) of section 601(b) provided another exception to the manufacturing requirements: where the author of "any substantial part" of the English-language text is neither a U.S. national nor domiciled in this country, the work is exempt. A variety of suggestions for amending this provision were put forward at the hearings, and the committee adopted one which would exempt works by American nationals domiciled abroad for at least a year. Under the amended clause, the manufacturing requirement would generally apply only to works by American authors domiciled here, and then only if none of the co-authors of the work is foreign.

The committee did not accept the recommendation to exempt works by aliens domiciled in the United States, the suggestion that the exemption for material of foreign authorship be confined to the "main body

of the text," or the suggestion that the exemption should be inapplicable where an American actually wrote the work as employee for hire of a foreign "author." It also considered, but did not adopt, the proposal put forward by the various segments of both the U.S. and the Canadian printing industries, recommending an exemption for copies manufactured in a country, like Canada, where wage standards are found to be substantially comparable to those in the United States. The complexity of the problems of foreign policy and administration raised by this proposal precludes its consideration as a part of the current revision of the copyright law.

Limitations on importation and distribution of copies manufactured abroad

The basic purpose of section 601, like that of the present manufacturing clause, is to induce the manufacture of an edition in the United States if more than a certain limited number of copies are to be distributed in this country. Subsection (a) therefore provides in general that "the importation into or public distribution in the United States" of copies not complying with the manufacturing clause is prohibited. Subsection (b) then sets out the exceptions to this prohibition, and clause (2) of that subsection in the 1965 bill, would have raised the number of copies permitted importation from 1,500 to 3,500. According to the Register's Supplementary Report (p. 145), "the 3,500-copy figure was suggested as the point, in the present book market, beyond which it is generally more costly for a publisher to import copies than to manufacture an edition here."

This increase was strongly opposed by representatives of the printing industry, who argued that, as in 1949 when the 1,500-copy limit was adopted, the number of copies allowed importation should be no more than needed to test the market for an American edition. They urged that more than doubling the limit is unjustified on this basis, and that the purpose of the exception should not be changed from one of "market testing" to one "maximizing publisher profits" that would cover much of the current output of university presses. The committee believes that, while some increase is necessary, the 3,500 figure is too high. In line with the amount considered in the compromise discussions mentioned above, the 1965 bill was amended to set the limit at 2,000 copies.

Additional exceptions to the copies affected by the manufacturing requirements are set out in clauses (3), (4), (5), and (6) of subsection (b). Clause (3) permits importation of copies for governmental use, other than in schools, by the United States or by "any State or political subdivision of a State." Clause (4) allows importation for personal use of "no more than one copy of any one work at any one time," and also exempts copies in the baggage of persons arriving from abroad and copies intended for the library collections of nonprofit scholarly, educational, or religious organizations. Braille copies are completely exempted under clause (5), and clause (6) permits the public distribution in the United States of copies allowed entry by the other clauses of that subsection.

What constitutes "manufacture in the United States"

A most difficult and, to some at least, the most important problem in the present manufacturing clause controversy involves the restric-

tions to be imposed on foreign typesetting or composition. Under what they regard as a loophole in the present law, a number of publishers have for years been having their manuscripts set in type abroad, importing "reproduction proofs," and then printing their books from offset plates "by lithographic process * * * wholly performed in the United States." The language of the statute on this point is ambiguous and, although the publishers' practice has received some support from the Copyright Office, the printing industry has argued that it violates the manufacturing requirements.

The laborious development of subsection (c), up to the introduction of H.R. 4347 in 1965, is reviewed at pages 146-147 of the Register's Supplementary Report. In general the book publishers have strongly opposed any definition of domestic manufacture that would close the "repro proof" loophole or that would interfere with their use of new techniques of book production, including use of imported computer tapes for composition here. If their construction of the present statute is correct, any more restrictive provision in the bill would probably violate U.S. treaty obligations under the General Agreement on Tariffs and Trade (GATT). On the other hand, the printing industry was unwilling to accept an outright exemption of foreign composition from the manufacturing requirements. Section 601(c), in the 1965 bill, was drafted to correspond almost exactly with the language of section 16 of the present statute, with the intention to perpetuate the meaning of the existing law.

The book publishers objected strenuously to this result. They argued that their industry has built its practices on the assumption that the law permits use of imported reproduction proofs as long as actual printing and binding are done in the United States, and that something this important should not be left to interpretation and argument. They urged that the statute specify that printing and binding are the only processes required to be performed in the United States, and that "preliminary or preparatory work," including composition and the making of reproduction proofs, is not covered.

This was, of course, one of the principal points in the compromise discussions among the various interests that took place in 1965. No agreement was reached, and at the hearings representatives of typographical firms and of printing trades unions opposed any change that would expressly permit composition or typesetting abroad under any circumstances. The Book Manufacturers Institute, while reiterating its conviction that the practice of printing from imported reproduction proofs violates the original intent of the law, acknowledged that the issue has never been judicially tested and that the practice has become widespread. The Institute recognized that this leaves a number of copyrights in danger, and therefore indicated that it would not oppose a legislative interpretation in the committee's report that would, at least to some extent, safeguard these copyrights.

The committee was impressed by the argument that the present ambiguous provision as to what constitutes manufacture in the United States should not be retained, and that the bill should state clearly what it means. It also concluded that the manufacturing requirement should be confined to the following processes: (1) typesetting

and plate making, "where the copies are printed directly from type that has been set, or directly from plates made from such type"; (2) the making of plates, "where the copies are printed directly from plates made by a lithographic or photoengraving process"; and (3) in all cases, the "printing or other final process of producing multiple copies and any binding of the copies." Under the amended subsection there would be nothing to prevent the importation of reproduction proofs, however they were prepared, as long as the plates from which the copies are printed are made here and are not themselves imported. Similarly, the importation of computer tapes from which plates can be prepared here would be permitted. However, regardless of the process involved, the actual duplication of multiple copies, together with any binding, are required to be done in the United States.

Effect of noncompliance with manufacturing requirement

Subsection (d) of section 601 makes clear that compliance with the manufacturing requirements no longer constitutes a condition of copyright protection, and that the effects of noncompliance are limited to rights with respect to reproduction and distribution of copies. The bill does away with the special "ad interim" time limits and registration requirements of the present law and, even if copies are imported or distributed in violation of the section, there would be no effect on the copyright owner's rights to make and distribute phonorecords of the work, to make derivative works including dramatizations and motion pictures, and to perform or display the work publicly. Even the rights to reproduce and distribute copies are not lost in cases of violation, although they are limited as against certain infringers.

Subsection (d) in the 1965 bill was revised by the committee in response to various suggestions. As amended, it provides a complete defense in any civil action or criminal proceeding for infringement of the exclusive rights of reproduction or distribution of copies where, under certain circumstances, the defendant proves violation of the manufacturing requirements. The defense is limited to infringement of the "nondramatic literary material comprised in the work and any other parts of the work in which the exclusive rights to reproduce and distribute copies are owned by the same person who owns such exclusive rights in the nondramatic literary material". This means, for example, that the owner of copyright in photographs or illustrations published in a book copyrighted by someone else would not be deprived of his rights against an infringer who proves that there had been a violation of section 601.

The committee's amendments of section 601 (d) of the 1965 bill place the full burden for proving violation on the infringer. His defense must be based on proof that: (1) copies in violation of section 601 have been imported or publicly distributed in the United States "by or with the authority" of the copyright owner; and (2) that the infringing copies complied with the manufacturing requirements; and (3) that the infringement began before an authorized edition complying with the requirements had been registered. The third of these clauses of subsection (d), means, in effect, that a copyright owner can rein-

state his full exclusive rights by manufacturing an edition in the United States and making registration for it.

Subsection (e), which was added to section 601 of the 1965 bill by the committee, requires the plaintiff in any infringement action involving publishing rights in material subject to the manufacturing clause to identify the manufacturers of the copies in his complaint. A corresponding addition in section 408 of the 1965 bill would require the manufacturers to be identified in applications for registration covering published works subject to the requirements of section 601.

SECTION 602. INFRINGING IMPORTATION

Scope of the section

Section 602, which has nothing to do with the manufacturing requirements of section 601, deals with two separate situations: importation of "piratical" articles (that is, copies or phonorecords made without any authorization of the copyright owner), and unauthorized importation of copies or phonorecords that were lawfully made. The general approach of section 602 is to make unauthorized importation an act of infringement in both cases, but to permit the Bureau of Customs to prohibit importation only of "piratical" articles.

Under section 602(a) of the 1965 bill, the unauthorized importation of copies or phonorecords "for the purpose of distribution to the public" would have been an infringement of the exclusive right of public distribution, except where an eleemosynary organization imported articles for its library. In view of the criticisms of this provision the committee amended the subsection.

The amended subsection, which is incorporated in the present bill, first states the general rule that unauthorized importation is an infringement merely if the copies or phonorecords "have been acquired abroad," but then enumerates three specific exceptions: (1) importation for governmental use other than in schools (but "not including copies of any audiovisual work imported for purposes other than archival use"); (2) importation for personal use of no more than one copy or phonorecord of a work at a time, or of articles in the personal baggage of travelers from abroad; or (3) importation by non-profit organizations "operated for scholarly, educational, or religious purposes" of "no more than one copy of an audiovisual work solely for its archival purposes, and no more than five copies or phonorecords of any other work for its library lending or archival purposes." Under the definition in section 101, "audiovisual works" include motion pictures. If none of the three exemptions applies, any unauthorized importer of copies or phonorecords acquired abroad could be sued for damages and enjoined from making any use of them, even before any public distribution in this country has taken place.

Importation of "piratical" copies

Section 602(b) retains the present statute's prohibition against importation of "piratical" copies or phonorecords—those whose making "would have constituted an infringement of copyright if this title

had been applicable." Thus, the Bureau of Customs could exclude copies or phonorecords that were unlawful in the country where they were made; it could also exclude copies or phonorecords which, although made lawfully under the domestic law of that country, would have been unlawful if the U.S. copyright law could have been applied. A typical example would be a work by an American author which is in the public domain in a foreign country because that country does not have copyright relations with the United States; the making and publication of an unauthorized edition would be lawful in that country, but the Bureau of Customs could prevent the importation of any copies of that edition.

Importation for infringing distribution

The second situation covered by section 602 is that where the copies or phonorecords were lawfully made but their distribution in the United States would infringe the U.S. copyright owner's exclusive rights. As already said, the mere act of importation in this situation would constitute an act of infringement and could be enjoined. However, in cases of this sort it would be impracticable for the Bureau of Customs to attempt to enforce the importation prohibition, and section 602(b) provides that, unless a violation of the manufacturing requirements is also involved, the Bureau has no authority to prevent importation "where the copies or phonorecords were lawfully made." The subsection would authorize the establishment of a procedure under which copyright owners could arrange for the Bureau to notify them whenever articles appearing to infringe their works are imported.

SECTION 603. ENFORCEMENT OF IMPORTATION PROHIBITIONS

The importation prohibition of both sections 601 and 602 would be enforced under section 603, which is similar to section 109 of the statute now in effect. Subsection (a) would authorize the Secretary of the Treasury and the Postmaster General to make regulations for this purpose, and subsection (c) provides for the disposition of excluded articles.

Subsection (b) of section 603 deals only with the prohibition against importation of "piratical" copies of phonorecords, and is aimed at solving problems that have arisen under the present statute. Since the Bureau of Customs is often in no position to make determinations as to whether particular articles are "piratical," section 603(b) would permit the Customs regulations to require the person seeking exclusion either to obtain a court order enjoining importation, or to furnish proof of his claim and to post bond.

SECTIONS 701 THROUGH 708. ADMINISTRATIVE PROVISIONS

Chapter 7, entitled "Copyright Office," sets forth the housekeeping provisions of the bill. Aside from the provisions on retention of deposits, catalogs, and fees, these sections appear to present no problems of content or interpretation requiring comment here.

Retention and disposition of deposited articles

A recurring problem in the administration of the copyright law has been the need to reconcile the storage limitations of the Copyright Office with the continued value of deposits in identifying copyrighted works. Aside from its indisputable utility to future historians and scholars, a substantially complete collection of both published and unpublished deposits, other than those selected by the Library of Congress, would avoid the many difficulties encountered when copies needed for identification in connection with litigation or other purposes have been destroyed. The basic policy behind section 704, which the committee has adopted, is that copyrighted deposits should be retained as long as possible, but that the Register of Copyrights and the Librarian of Congress should be empowered to dispose of them under appropriate safeguards when they decide that it has become necessary to do so.

Under subsection (a) of section 704, any copy, phonorecord, or identifying material deposited for registration, whether registered or not, becomes "the property of the United States." This means that the copyright owner or person who made the deposit cannot demand its return as a matter of right, even in rejection cases, although the provisions of sections 406 and 407 are flexible enough to allow for special arrangements in exceptional cases. On the other hand, Government ownership of deposited articles under section 704(a) carries with it no privileges under the copyright itself; use of a deposited article in violation of the copyright owner's exclusive rights would be infringement.

With respect to published works, section 704(b) makes all deposits available to the Library of Congress "for its collections, or for exchange or transfer to any other library"; where the work is unpublished, the Library is authorized to select the deposit for its own collections, but not for transfer outside the Library. Motion picture producers have expressed some concern lest the right to transfer copies of works, such as motion pictures, that have been published under rental, lease, or loan arrangements, might lead to abuse. However, the Library of Congress has not knowingly transferred works of this sort to other libraries in the past, and there is no reason to expect it to do so in the future.

For deposits not selected by the Library, subsection (c) provides that they, or "identifying portions or reproductions of them," are to be retained under Copyright Office control "for the longest period considered practicable and desirable" by the Register and the Librarian. When and if they ultimately decide that retention of certain deposited articles is no longer "practicable and desirable," the Register and Librarian have joint discretion to order their "destruction or other disposition." The 1965 bill would have extended this discretion to unpublished works still under copyright if the copyright owner were first given a chance to reclaim the deposit. Because of the unique value and irreplaceable nature of unpublished deposits, however, the

committee amended the subsection to require their preservation throughout their term of copyright.

Subsection (d) of section 704 establishes a new procedure under which a copyright owner can request retention of deposited material for the full term of copyright. The Register of Copyrights is authorized to issue regulations prescribing the fees for this service and the "conditions under which such requests are to be made and granted."

Catalog of copyright entries

Section 707(a) of the bill retains the present statute's basic requirement that the Register compile and publish catalogs of all copyright registrations at periodic intervals, but gives him "discretion to determine, on the basis of practicability and usefulness, the form and frequency of publication of each particular part." Despite some expressed misgivings, the committee believes that this provision will in no way diminish the utility or value of the present catalogs, and that the flexibility of approach, coupled with use of the new mechanical and electronic devices now becoming available, will avoid waste and result in a better product.

Copyright Office fees

The schedule of fees set out in section 708 of the bill is consistent in amount with the fee increase recently enacted by Congress (Public Law 89-297, effective November 26, 1965): the basic fees are \$6 for registration, \$4 for renewal registration, \$5 up for recordation of documents, and \$5 per hour for searching. The section also contains new fee provisions needed because of new requirements or services established under the bill, and subsection (a) (11) authorizes the Register to fix additional fees, on the "basis of the cost of providing the service," for "any other special services requiring a substantial amount of time or expense." Subsection (b) makes clear that, unless he chooses to waive them in "occasional or isolated cases involving relatively small amounts," the Register is to charge fees for services he renders to other Government agencies.

TRANSITIONAL AND SUPPLEMENTARY PROVISIONS

Section 1 of H.R. 2512 consists of the completely revised text of title 17 of the United States Code, containing seven chapters and 56 sections running from section 101 through section 708. Sections 2 through 12 of the bill are "transitional and supplementary" provisions which would not be a part of the new title 17.

Effective date

Under section 2 of the transitional and supplementary provisions, the revised title 17 would come into effect on January 1, 1969, "except as otherwise provided by section 304(b)." The bill provides that at least a year should be allowed between the dates of enactment and of taking effect to prepare for the substantive, procedural, and administrative changes the new law will bring.

The reference to section 304(b) in section 2 is necessary to take account of the special cases of subsisting renewal copyrights that

have already been extended under Public Laws 87-668 and 89-142, of renewal copyrights scheduled to expire during 1968, and of copyrights for which renewal registration is made between December 31, 1967, and December 31, 1968. In these cases the new statute would operate, before its effective date, to extend the total duration of copyright to 75 years from the date it was secured.

Works in the public domain

Since there can be no protection for any work that has fallen into the public domain before January 1, 1969, section 3 makes clear that lost or expired copyrights cannot be revived under the bill. The second sentence of the section, which prohibits recording rights in nondramatic musical works copyrighted before July 1, 1909, relates to the provision in the 1909 act limiting recording rights to musical works copyrighted after its effective date.

Amendments of other statutes

Section 5 in the present bill contains five subsections, each amending an existing Federal statute that refers to copyright protection. Consistent with the provisions of section 105 on works of the U.S. Government, subsection (a) repeals the vestigial provision of the Printing Act dealing with the same subject. As explained above in connection with section 301, subsection (b) amends the Federal Records Act of 1950 to preserve immunity of the General Services Administration with respect to infringement of Presidential papers that have neither been published nor registered for copyright.

Section 1498(b) of title 28 of the United States Code, the provision dealing with Government liability for copyright infringement, is amended by section 5(c) to substitute the appropriate section number. The Department of Defense recommended further amendments that would limit the application of section 1498(b) to published works, thus preserving governmental immunity with respect to unpublished works now under common law protection, and that would foreclose the recovery of statutory damages in actions against the Government. The committee, however, feels that there is not sufficient justification for according the Government special treatment in these situations.

Subsection (d) of section 5 would amend section 543(a)(4) of the Internal Revenue Code, as amended, to delete a parenthetical phrase exempting common law copyrights and copyrights in commercial prints and labels from special treatment of personal holding company income; the Treasury Department has agreed to this amendment. Finally, subsection (e) repeals a clause of section 4152(a) of title 37 of the United States Code dealing with the free mailing privilege for copyright deposits under the present law.

Existing compulsory licenses for mechanical reproduction of music

As already explained in connection with section 115, the bill would preserve the general principle of a compulsory license for the mechanical reproduction of copyrighted music, but with a great many changes

in specific features. Section 6 is a transitional provision dealing with the status of compulsory licenses that have already been obtained when the new law becomes effective. In general it would permit the compulsory licensee to "continue to make and distribute such parts [i.e., phonorecords] embodying the same mechanical reproduction [i.e., sound recording] without obtaining a new compulsory license." However, any new "mechanical reproduction" would be fully subject to the provisions of section 115 and, even where the earlier sound recording is reproduced, any phonorecords made after January 1, 1969 would be subject to the provisions of the revised statute as to royalty rate, methods of payment, and consequences of default.

Ad interim copyrights

As an exception to the manufacturing requirements, sections 22 and 23 of the present statute provide a special procedure under which, if registration is made within 6 months after publication, a temporary or "ad interim" copyright can be secured for 5 years. The "ad interim" time limits and procedures have been dropped from the manufacturing provisions of section 601 of the bill, and section 7 therefore deals with the transitional case of "any work in which ad interim copyright is subsisting or is capable of being secured on December 31, 1968." Where a work is already covered by an ad interim copyright or, having been published during the last 6 months of 1968, the work is eligible for ad interim registration on that date, its copyright protection is automatically extended to the full term provided by section 304.

Notice in copies of previously published works

Since the notice requirements of the new statute are different and, with respect to the year date, more inclusive than those of the present law, a transitional provision is needed to cover works first published before the effective date of the revised law. Section 8 makes clear that, as a general rule, the notice provisions of the new law apply to "all copies or phonorecords publicly distributed after January 1, 1969," but adds that, in the case of a work published before that date, "compliance with the notice provisions of title 17 either as it existed on December 31, 1968, or as amended by this act, is adequate with respect to copies publicly distributed after December 31, 1968."

Registration and recordation with respect to subsisting copyrights

Section 9 of the transitional and supplementary provisions makes clear that registration and recordation on the basis of materials received in the Copyright Office before the effective date of the new law are to be made under the present law, even though the process is completed after January 1, 1969. Where the Register of Copyrights makes a demand, either before or after the effective date of the new law, for deposit of copies published before that date, section 10 provides that the demand, and the effect of noncompliance with it, will be governed by the present statute; however, any deposit, application, and fee received after December 31, 1968, in response to the demand are to be filed in accordance with the revised statute.

Several provisions of the bill, including sections 205(c)(2), 205(d), 404(a)(2), 405(a)(1), 405(a)(2), 410, and 411, prescribe registration or recordation as a prerequisite of certain purposes. Where the work involved is covered by a subsisting copyright when the new law becomes effective, it is intended that any registration or recordation made under the present law would satisfy these provisions.

Other transitional and supplementary provisions

Section 11 makes clear that a cause of action existing on January 1, 1969, is to be governed by the law under which it arose, and section 12 is the familiar clause preserving the constitutionality of the remainder of the statute if any part of it is held unconstitutional.

CHANGES IN EXISTING LAW

In compliance with clause 3 of rule XIII of the House of Representatives there are printed below:

(a) with respect to section 1 of the bill as reported, proposing to amend title 17 of the United States Code in its entirety, parallel columns showing (1) the provisions of the bill as reported and (2) the provisions of existing law (a third column included for convenient reference shows the provisions of the 1965 bill, H.R. 4347, as introduced in the 89th Congress); and

(b) with respect to other provisions of the bill as reported, in roman, existing law in which no change is proposed by the bill as reported, with matter proposed to be stricken by the bill as reported enclosed in black brackets; with new language proposed by the bill as reported printed in italic:

(A) AMENDMENT OF TABLE 17, UNITED STATES CODE

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TITLE 17—COPYRIGHTS

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TITLE 17—COPYRIGHTS

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PROVISIONS OF THE BILL AS REPORTED
**CHAPTER 1—SUBJECT MATTER AND
 SCOPE OF COPYRIGHT**

- Sec.
101. Definitions.
102. Subject matter of copyright: In general.
103. Subject matter of copyright: Compilations and derivative works.
104. Subject matter of copyright: National origin.
105. Subject matter of copyright: United States Government works.
106. Exclusive rights in copyrighted works.
107. Limitations on exclusive rights: Fair use.

PROVISIONS OF EXISTING LAW
**CHAPTER 1—REGISTRATION OF
 COPYRIGHTS**

- § 1. Exclusive rights as to copyrighted works.
- § 2. Rights of author or proprietor of unpublished work.
- § 3. Protection of component parts of work copyrighted; composite works or periodicals.
- § 4. All writings of author included.
- § 5. Classification of works for registration.
- § 6. Registration of prints and labels.
- § 7. Copyright on compilations of works in public domain or of copyrighted works; subsisting copyrights not affected.
- § 8. Copyright not to subsist in works in public domain, or published prior to July 1, 1909, and not already copyrighted, or Government publications; publication by Government of copyrighted material.
- § 9. Authors or proprietors, entitled; aliens.
- § 10. Publication of work with notice.
- § 11. Registration of claim and issuance of certificate.
- § 12. Works not reproduced for sale.
- § 13. Deposit of copies after publication; action or proceeding for infringement.
- § 14. Same; failure to deposit; demand; penalty.
- § 15. Same; postmaster's receipt; transmission by mail without cost.

PROVISIONS OF THE 1905 BILL
**CHAPTER 1—SUBJECT MATTER AND
 SCOPE OF COPYRIGHT**

- Sec.
101. Definitions.
102. Subject matter of copyright: in general.
103. Subject matter of copyright: compilations and derivative works.
104. Subject matter of copyright: national origin.
105. Subject matter of copyright: United States Government works.
106. Exclusive rights in copyrighted works.
107. Limitations on exclusive rights: fair use.

108. Limitations on exclusive rights: Re-production of works in archival collections.
109. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord.
110. Limitations on exclusive rights: Ex-emption of certain performances and displays.
111. Limitations on exclusive rights: Sec-ondary transmissions.
112. Limitations on exclusive rights: Ephemeral recordings.
113. Scope of exclusive rights in pictorial, graphic, and sculptural works.
114. Scope of exclusive rights in sound recordings.
115. Scope of exclusive rights in non-dramatic musical works: Compul-sory license for making and dis-tributing phonorecords.
116. Scope of exclusive rights in nondra-matic musical works: Public per-formances by means of coin-opera-ted phonorecord players.
- § 16. Mechanical work to be done in United States.
- § 17. Affidavit to accompany copies.
- § 18. Making false affidavit.
- § 19. Notice; form.
- § 20. Same; place of application of; one notice in each volume or number of newspaper or periodical.
- § 21. Same; effect of accidental omission from copy or copies.
- § 22. Ad interim protection of book or periodical published abroad.
- § 23. Same; extensor to full term.
- § 24. Duration; renewal and extension.
- § 25. Renewal of copyrights registered in Patent Office under repealed law.
- § 26. Terms defined.
- § 27. Copyright distinct from property in object copyrighted; effect of sale of object, and of assignment of copyright.
- § 28. Assignments and bequests.
- § 29. Same; executed in foreign country; acknowledgment and certificate.
- § 30. Same; record.
- § 31. Same; certificate of record.
- § 32. Same; use of name of assignee in notice.
- [No parallel provision.]
108. Limitations on exclusive rights: effect of transfer of particular copy or phonorecord.
109. Limitations on exclusive rights: ex-emption of certain performances and exhibitions.
[No parallel provision.]
110. Limitations on exclusive rights: ephemeral recordings.
111. Scope of exclusive rights in pictorial, graphic, and sculptural works.
112. Scope of exclusive rights in sound recordings.
113. Scope of exclusive rights in nondra-matic musical works: compulsory license for making and distributing phonorecords.
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 201. Ownership of copyright.
 202. Ownership of copyright as distinct from ownership of material object.
 203. Termination of transfers and licenses granted by the author.
 204. Execution of transfers of copyright ownership.
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**CHAPTER 2—INFRINGEMENT PRO-
 CEEDINGS**

- § 101.** Infringement:
 (a) Injunction.
 (b) Damages and profits; amounts; and remedies.
 (c) Impounding during action.
 (d) Destruction of infringing copies and plates.
 (e) Royalties for use of mechanical reproduction of musical works.
- § 104.** Willful infringement for profit.
§ 105. Fraudulent notice of copyright, or removal or alteration of notice.
§ 106. Importation of article bearing false notice or piratical copies of copyrighted work.
§ 107. Importation, during existence of copyright, of piratical copies, or of copies not produced in accordance with section 16 of this title.
§ 108. Forfeiture and destruction of articles prohibited importation.
§ 109. Importation of prohibited articles; regulations; proof of deposit of copies by complainants.
§ 112. Injunctions; service and enforcement.
§ 113. Transmission of certified copies of papers for enforcement of injunction by other court.
§ 114. Review of orders, judgments, or decrees.
§ 115. Limitations.
§ 116. Costs; attorney's fees.

PROVISIONS OF THE 1965 BILL
**CHAPTER 2—COPYRIGHT OWNER-
 SHIP AND TRANSFER**

- Sec.**
 201. Ownership of copyright.
 202. Ownership of copyright as distinct from ownership of material object.
 203. Termination of transfers and licenses granted by the author.
 204. Execution of transfers of copyright ownership.
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**CHAPTER 3—DURATION OF
COPYRIGHT**

- Sec. 301. Pre-emption with respect to other laws.
- 302. Duration of copyright: works created on or after January 1, 1967.
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PROVISIONS OF THE BILL AS REPORTED

§ 101. Definitions

As used in this title, the following terms and their variant forms mean the following:

An "anonymous work" is a work on the copies or phonorecords of which no natural person is identified as author.

The "area normally encompassed" by a transmission comprises the entire geographic area within the radius that the transmitter's signal is expected to reach effectively under normal conditions, including any parts of the area within that radius that its signal fails to reach effectively because of terrain, structures, or other physical or technical barriers. The Register of Copyrights may, by regulation, further particularize this definition, taking into account any pertinent definition in a Federal statute or regulation.

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

The "best edition" of a work is the edition, published in the United States at any time before the date of deposit, that the *Library of Congress* determines to be most suitable for its purposes.

PROVISIONS OF THE 1965 BILL

§ 101. Definitions ¹

As used in this title, the following terms and their variant forms mean the following:

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[No parallel provision.]

[No parallel provision.]

The "best edition" of a work is the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.

¹ The definitions below are from section 101, unless otherwise indicated.

A person's "children" are his immediate offspring, whether legitimate or not, and any children legally adopted by him.

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A "compilation" is a work formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

"Copyright owner," with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

A person's "children" are his immediate offspring, whether legitimate or not, and any children legally adopted by him.

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

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A "derivative work" is a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

A "device," "machine," or "process" is one now known or later developed.

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being

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A "derivative work" is a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

A "device," "machine," or "process" is one now known or later developed.

§ 106. Exclusive rights in copyrighted works

(b) DEFINITIONS OF CERTAIN EXCLUSIVE RIGHTS.—

(2) To "exhibit" a work means to show a copy of it, either directly or by means of motion picture films, slides, television images, or any other device or process.

[No parallel provision.]

transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

The terms "including" and "such as" are illustrative and not limitative.

A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

"Literary works" are works expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, or film, in which they are embodied.

"Motion pictures" are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

The terms "including" and "such as" are illustrative and not limitative.

A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

"Literary works" are works expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, or film, in which they are embodied.

"Motion pictures" are works that consist of a series of images which, when shown in succession, impart an impression of motion, together with any accompanying sounds, regardless of the nature of the material objects, such as films or tapes, in which they are embodied.

§ 106. Exclusive rights in copyrighted works

* * * * *
(b) DEFINITIONS OF CERTAIN EXCLUSIVE RIGHTS.—

(1) To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture, to show its images or to make the sounds accompanying it audible.

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in sequence or to make the sounds accompanying it audible.

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"Phonorecords" are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, plans, diagrams, and models.

A "pseudonymous work" is a work on the copies or phonorecords of which the author is identified under a fictitious name. "Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending.

To perform or display a work "publicly" means:

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its

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"Phonorecords" are material objects in which sounds, other than those accompanying a motion picture, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, plans, diagrams, and models.

A "pseudonymous work" is a work on the copies or phonorecords of which the author is identified under a fictitious name.

"Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending.

§ 106. Exclusive rights in copyrighted works

(b) DEFINITIONS OF CERTAIN EXCLUSIVE RIGHTS.—

- (3) To perform or exhibit a work "publicly" means:
 - (A) to perform or exhibit it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of

§ 26. TERMS DEFINED.—In the interpretation and construction of this title "the date of publication" shall in the case of a work of which copies are reproduced for sale or distribution be held to be the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority

family and social acquaintances is gathered;

(B) to transmit or otherwise communicate a performance or exhibition of the work to the public by means of any device or process.

"Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

"State" includes the District of Columbia and the Commonwealth of Puerto Rico, and any territories to which this title is made applicable by an act of Congress.

A "transfer of copyright ownership" is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a non-exclusive license.

[No parallel provision.]

To "transmit" a performance or exhibition is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

social acquaintances is gathered;

(2) to transmit or otherwise communicate a performance or display of the work to the public by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

"Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

"State" includes the District of Columbia and the Commonwealth of Puerto Rico, and any territories to which this title is made applicable by an act of Congress.

A "transfer of copyright ownership" is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a non-exclusive license.

A "transmission program" is a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit.

To "transmit" a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

PROVISIONS OF THE BILL AS REPORTED

The "United States," when used in a geographical sense, comprises the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

The author's "widow" or "widower" is the author's surviving spouse under the law of his domicile at the time of his death, whether or not the spouse has later remarried.

A "work made for hire" is:

- (1) a work prepared by an employee within the scope of his employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. A "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendices, and indexes. An "instructional text" is a literary, pictorial, or graphic work prepared for publication with the purpose of use in systematic instructional activities.

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The "United States," when used in a geographical sense, comprises the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

The author's "widow" or "widower" is the author's surviving spouse under the law of his domicile at the time of his death, whether or not the spouse has later remarried.

A "work made for hire" is:

- (1) a work prepared by an employee within the scope of his employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture, as a translation, or as a supplementary work, if the parties expressly agree in writing that the work shall be considered a work made for hire.

A "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, illustrating, explaining, commenting upon, or assisting in the use of the other work, such as forewords, introductions, prefaces, pictorial illustrations, maps, charts, tables, editorial notes, tests and answers, bibliographies, appendices and indexes.

§ 26. * * * the word "author" shall include an employer in the case of works made for hire.

§ 102. Subject matter of copyright: In general

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings.

§ 4. ALL WRITINGS OF AUTHOR INCLUDED.—The works for which copyright may be secured under this title shall include all the writings of an author.

§ 5. CLASSIFICATION OF WORKS FOR REGISTRATION.—The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

- (a) Books, including composite and cyclopedic works, directories, gazetteers, and other compilations.
- (b) Periodicals, including newspapers.
- (c) Lectures, sermons, addresses prepared for oral delivery.
- (d) Dramatic or dramatico-musical compositions.
- (e) Musical compositions.
- (f) Maps.
- (g) Works of art; models or designs for works of art.
- (h) Reproductions of a work of art.
- (i) Drawings or plastic works of a scientific or technical character.
- (j) Photographs.
- (k) Prints and pictorial illustrations including prints or labels used for articles of merchandise.
- (l) Motion-picture photoplays.
- (m) Motion pictures other than photoplays.

The above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title * * *

§ 102. Subject matter of copyright: In general

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures;
- (7) sound recordings.

PROVISIONS OF THE BILL AS REPORTED

§ 103. Subject matter of copyright: Compilations and derivative works

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing pre-existing material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the pre-existing material employed in the work, and does not imply any exclusive right in the pre-existing material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the pre-existing material.

§ 104. Subject matter of copyright: National origin

(a) UNPUBLISHED WORKS.—The works specified by sections 102 and 103, while unpublished, are subject to protection under this title without regard to the nationality or domicile of the author.

(b) PUBLISHED WORKS.—The works specified by sections 102 and 103, when published, are subject to protection under this title if—

(1) on the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary or sovereign authority of a foreign nation that is a party

PROVISIONS OF EXISTING LAW

§ 7. COPYRIGHT ON COMPILATIONS OF WORKS IN PUBLIC DOMAIN OR OF COPYRIGHTED WORKS; SUBSISTING COPYRIGHTS NOT AFFECTED.—Compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this title; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works.

§ 9. AUTHORS OR PROPRIETORS, ENTITLED: ALIENS.—The author or proprietor of any work made the subject of copyright by this title, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in this title: *Provided, however,* That the copyright secured by this title shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation only under the conditions described in subsections (a), (b), or (c) below:

(a) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his

PROVISIONS OF THE 1965 BILL

§ 103. Subject matter of copyright: Compilations and derivative works

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing pre-existing material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the pre-existing material employed in the work, and does not imply any exclusive right in the pre-existing material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of any copyright protection in the pre-existing material.

§ 104. Subject matter of copyright: National origin

(a) UNPUBLISHED WORKS.—The works specified by sections 102 and 103, while unpublished, are subject to protection under this title without regard to the nationality or domicile of the author.

(b) PUBLISHED WORKS.—The works specified by sections 102 and 103, when published, are subject to protection under this title if—

(1) on the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary, or sovereign authority of a foreign nation that is a

to a copyright treaty to which the United States is also a party; or

(2) the work is first published in the United States or in a foreign nation that, on the date of first publication, is a party to the Universal Copyright Convention of 1952; or

(3) the work is first published by the United Nations or any of its specialized agencies, or by the Organization of American States; or

(4) the work comes within the scope of a Presidential proclamation. Whenever the President finds that a particular foreign nation extends, to works by authors who are nationals or domiciliaries of the United States or to works that are first published in the United States,

work; or

(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection, substantially equal to the protection secured to such foreign author under this title or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.

The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purposes of this title may require: *Provided*, That whenever the President shall find that the authors, copyright owners, or proprietors of works first produced or published abroad and subject to copyright or to renewal of copyright under the laws of the United States, including works subject to ad interim copyright, are or may have been temporarily unable to comply with the conditions and formalities prescribed with respect to such works by the copyright laws of the United States, because of the disruption or suspension of facilities essential for such compliance, he may by proclamation grant such extension of time as he may deem appropriate for the fulfillment of such conditions or formalities by authors, copyright owners, or proprietors who are citizens of the United States or who are nationals of countries which accord sub-

party to a copyright treaty to which the United States is also a party; or

(2) the work is first published in the United States or in a foreign nation that, on the date of first publication, is a party to the Universal Copyright Convention of 1952; or

(3) the work is first published by the United Nations or any of its specialized agencies, or by the Organization of American States; or

(4) the work comes within the scope of a Presidential proclamation. Whenever he finds it to be in the national interest, the President may in his discretion extend, by proclamation, protection under this title to works of which one or more of the authors is, on the date of

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copyright protection on substantially the same basis as that on which the foreign nation extends protection to works of its own nationals and domiciliaries and works first published in that nation, he may by proclamation extend protection under this title to works of which one or more of the authors is, on the date of first publication, a national, domiciliary, or sovereign authority of that nation, or which was first published in that nation. The President may revise, suspend, or revoke any such proclamation or impose any conditions or limitations on protection under a proclamation.

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stantially equal treatment in this respect to authors, copyright owners, or proprietors who are citizens of the United States: *Provided further*, That no liability shall attach under this title for lawful uses made or acts done prior to the effective date of such proclamation in connection with such works, or in respect to the continuance for one year subsequent to such date of any business undertaking or enterprise lawfully undertaken prior to such date involving expenditure or contractual obligation in connection with the exploitation, production, reproduction, circulation, or performance of any such work.

The President may at any time terminate any proclamation authorized herein or any part thereof or suspend or extend its operation for such period or periods of time as in his judgment the interests of the United States may require.

(c) When the Universal Copyright Convention, signed at Geneva on September 6, 1952, shall be in force between the United States of America and the foreign state or nation of which such author is a citizen or subject, or in which the work was first published. Any work to which copyright is extended pursuant to this subsection shall be exempt from the following provisions of this title: (1) The requirement in section 1(e) that a foreign state or nation must grant to United States citizens mechanical reproduction rights similar to those specified therein; (2) the obligatory deposit requirements of the first sentence of

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first publication, a national, domiciliary, or sovereign authority of any designated foreign nation, or which are first published in any designated foreign nation, and he may revise, suspend, or revoke any proclamation or impose any conditions or limitations on protection under a proclamation.

section 13; (3) the provisions of sections 14, 16, 17, and 18; (4) the import prohibitions of section 107, to the extent that they are related to the manufacturing requirements of section 16; and (5) the requirements of sections 19 and 20: *Provided, however*, That such exemptions shall apply only if from the time of first publication all the copies of the work published with the authority of the author or other copyright proprietor shall bear the symbol © accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright.

Upon the coming into force of the Universal Copyright Convention in a foreign state or nation as hereinbefore provided, every book or periodical of a citizen or subject thereof in which an interim copyright was subsisting on the effective date of said coming into force shall have copyright for twenty-eight years from the date of first publication abroad without the necessity of complying with the further formalities specified in section 23 of this title.

The provisions of this subsection shall not be extended to works of an author who is a citizen of, or domiciled in the United States of America regardless of place of first publication, or to works first published in the United States.

PROVISIONS OF THE BILL AS REPORTED

§ 105. Subject matter of copyright: United States Government works

(a) Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

(b) A "work of the United States Government" is a work prepared by an officer or employee of the United States Government as part of his official duties.

PROVISIONS OF EXISTING LAW

§ 8. COPYRIGHT NOT TO SUBSIST IN WORKS IN PUBLIC DOMAIN, OR PUBLISHED PRIOR TO JULY 1, 1909, AND NOT ALREADY COPYRIGHTED, OR GOVERNMENT PUBLICATIONS; PUBLICATION BY GOVERNMENT OF COPYRIGHTED MATERIAL.—No copyright shall subsist in the original text of any work which is in the public domain, or in any work which was published in this country or any foreign country prior to July 1, 1909, and has not been already copyrighted in the United States, or in any publication of the United States Government, or any reprint, in whole or in part, thereof, except that the Postmaster General may secure copyright on behalf of the United States in the whole or any part of the publications authorized by section 2506 of title 39.

The publication or republication by the Government, either separately or in a public document, of any material in which copyright is subsisting shall not be taken to cause any abridgement or annulment of the copyright or to authorize any use or appropriation of such copyright material without the consent of the copyright proprietor.

§ 1. EXCLUSIVE RIGHTS AS TO COPYRIGHTED WORKS.—Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

PROVISIONS OF THE 1905 BILL

§ 105. Subject matter of copyright: United States Government works

(a) Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

(b) A "work of the United States Government" is a work prepared by an officer or employee of the United States Government within the scope of his official duties or employment.

§ 106. Exclusive rights in copyrighted works

(a) **GENERAL SCOPE OF COPYRIGHT.**—Subject to sections 107 through 114, the owner of copyright under this title has the exclusive rights to do and to authorize any

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 116, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, to exhibit the copyrighted work publicly.

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

(c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of \$100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen; and

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, to display the copyrighted work publicly.

* * * * *

PROVISIONS OF THE BILL AS REPORTED

by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; and

(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced * * * *
[No parallel provision.]

§ 107. Limitations on exclusive rights:
Fair use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

- (1) the purpose and character of the use;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

PROVISIONS OF THE 1908 BILL

§ 107. Limitations on exclusive rights:
Fair use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work is not an infringement of copyright.

[No parallel provision.]

[No parallel provision.]

§ 108. Limitations on exclusive rights: Reproduction of works in archival collections

Notwithstanding the provisions of section 106, it is not an infringement of copyright for a nonprofit institution, having archival custody over collections of manuscripts, documents, or other unpublished works of value to scholarly research, to reproduce, without any purpose of direct or indirect commercial advantage, any such work in its collections in facsimile copies or phonorecords for purposes of preservation and security, or for deposit for research use in any other such institution.

§ 109. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord

(a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by him, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

(b) Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by him, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

(c) The privileges prescribed by subsections (a) and (b) do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.

§ 27. COPYRIGHT DISTINCT FROM PROPERTY IN OBJECT COPYRIGHTED; EFFECT OF SALE OF OBJECT, AND OF ASSIGNMENT OF COPYRIGHT.—The copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; but nothing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.

§ 108. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord

(a) Notwithstanding the provisions of section 106(a)(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by him, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

(b) Notwithstanding the provisions of section 106(a)(5), the owner of a particular copy lawfully made under this title, or any person authorized by him, is entitled, without the authority of the copyright owner, to exhibit that copy publicly to viewers present at the place where the copy is located.

(c) The privileges prescribed by subsections (a) and (b) do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.

PROVISIONS OF EXISTING LAW

PROVISIONS OF THE BILL AS REPORTED

**§ 110. Limitations on exclusive rights:
Exemption of certain performances and displays**

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance is given by means of a copy that was not lawfully made under this title and that the person responsible for the performance knew or had reason to believe was not lawfully made;

(2) performance of a nondramatic literary or musical work, or display of a work, by or in the course of a transmission by a governmental body or other nonprofit organization, if:

(A) the performance or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and

(B) the radius of the area normally encompassed by the transmission is no more than 100 miles; and

(C) the transmission is made primarily for:

(i) reception in classrooms or similar places normally devoted to instruction, or

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**§ 109. Limitations on exclusive rights:
Exemption of certain performances and exhibitions**

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) performance or exhibition of a work by instructors or pupils in the course of face-to-face teaching activities in a classroom or similar place normally devoted to instruction;

(2) performance of a nondramatic literary or musical work, or exhibition of a work, by or in the course of a transmission, if the transmission is made primarily for reception in classrooms or similar places normally devoted to instruction and is a regular part of the systematic instructional activities of a nonprofit educational institution;

[Under subsections (c) and (e) of section 1, *supra*, the exclusive right of the copyright owner to perform a nondramatic literary or musical work is limited to a public performance *for profit*]

(ii) reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or

(iii) reception by officers or employees of governmental bodies as a part of their official duties or employment; and

(D) the time and content of the transmission are controlled by the transmitting organization and do not depend on a choice by individual recipients in activating transmission from an information storage and retrieval system or any similar device, machine, or process;

(3) performance of a nondramatic literary or musical work or of a dramatic-musical work of a religious nature, or display or a work, in the course of services at a place of worship or other religious assembly;

(4) performance of a nondramatic literary or musical work, otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if:

(A) there is no direct or indirect admission charge, or

(B) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable

§ 104. * * * nothing in this title shall be so construed as to prevent the performance of religious or secular works such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit.

(3) performance of a nondramatic literary or musical work or of a dramatic-musical work, or exhibition of a work, in the course of services at a place of worship or other religious assembly;

(4) performance of a nondramatic literary or musical work, otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if:

(A) there is no direct or indirect admission charge, or

(B) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable

purposes and not for private financial gain, except where the copyright owner has served notice of his objections to the performance under the following conditions:

- (i) the notice shall be in writing and signed by the copyright owner or his duly authorized agent; and
- (ii) The notice shall be served on the person responsible for the performance at least seven days before the date of the performance, and shall state the reasons for his objections; and

(iii) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation;

(5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless:

- (A) a direct charge is made to see or hear the transmission; or
- (B) the transmission thus received is further transmitted to the public.

§ 111. Limitations on exclusive rights: Secondary transmissions

(a) CERTAIN SECONDARY TRANSMISSIONS EXEMPTED.—

(i) Notwithstanding the provisions of subsections (b) and (c), the secondary transmission to the public of a primary transmission embodying a performance or display of a work is not an infringement of copyright if:

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 purposes and not for private financial gain;

(7) communication of a transmission embodying a performance or exhibition of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless:

- (A) a direct charge is made to see or hear the transmissions; or
- (B) the transmission thus received is further transmitted to the public.

§ 109. Limitations on exclusive rights: Exemption of certain performances and exhibitions

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

- * * * * *
- (6) the further transmitting of a transmission embodying a performance

or exhibition of a work by relaying it to the private rooms of a hotel or other public establishment through a system of loudspeakers or other devices in such rooms, unless the person responsible for relaying the transmission or the operator of the establishment:

- (A) alters or adds to the content of the transmission; or
- (B) makes a separate charge to the occupants of the private rooms directly to see or hear the transmission;

§ 109. Limitations on exclusive rights: Exemption of certain performances and exhibitions

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

- * * * * *
- (5) the further transmitting to the public of a transmission embodying a performance or exhibition of a work, if the further transmission is made without altering or adding to the content of the original transmission, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the further transmission;

(A) the secondary transmission consists entirely of relaying the primary transmission to the private rooms of a hotel or other public establishment, and no direct charge is made to the occupants of the private rooms to see or hear the secondary transmission; or

(B) the secondary transmission is made solely for the purpose and under the conditions specified by clause (2) of section 110; or

(C) the secondary transmission is made by a common carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others.

(2) Notwithstanding the provisions of subsection (c), but subject to the provisions of subsection (b), the secondary transmission to the public of a primary transmission embodying a performance or display of a work is not an infringement of copyright if the secondary transmission is made by a governmental body, or other nonprofit organization, without any purpose of direct or indirect commercial advantage, and without any charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.

(3) Subject to the provisions of subsections (b) and (c), the secondary transmission to the public of a primary transmission embodying a performance or display of a work is not an infringement of copyright if the secondary transmission is made for reception solely within the limits of the area normally encompassed by the primary transmission.

(b) CERTAIN SECONDARY TRANSMISSIONS FULLY ACTIONABLE.—Notwithstanding the provisions of subsection (c) and of clauses (2) and (3) of subsection (a), the secondary transmission to the public of a primary transmission embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, if:

(1) the content of the particular transmission program in which the performance or display is embodied, together with any separate commercial advertising or station announcements transmitted by the primary transmitter immediately before or after the transmission program, is in any way altered by changes, deletions, or additions during its secondary transmission; or

(2) the secondary transmitter, within one month before or after the particular secondary transmission, originates any transmissions to those members of the public to whom it also makes the secondary transmission, except for no more than two transmission programs at any one time unaccompanied by any commercial or political advertising and con-

sisting solely of: weather, time, and news reports free from editorial comment; agricultural reports; religious services; and local proceedings of governmental bodies; or

(3) the secondary transmitter, within one month before or after the particular secondary transmission, makes any separate, direct charge for any particular transmission it makes to those members of the public to whom it also makes the secondary transmission; or

(4) the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public; or

(5) the secondary transmission is made for reception wholly or partly outside the limits of the area normally encompassed by the primary transmission, and

(A) the secondary transmitter, at least one month before the date of the secondary transmission, has not recorded in the Copyright Office, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, the identity and address of the person who owns the secondary transmission service or, has power to exercise primary control over it, together with the name and location of the primary transmitter; or

(B) the secondary transmission is made for reception wholly or partly within the limits of an area that is adequately served by transmitting facilities other than the primary transmitter; or

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(6) the secondary transmission is made for reception wholly or partly within the limits of an area normally encompassed by one or more transmitting facilities, other than the primary transmitter, if—

(A) a transmitting facility other than the primary transmitter has the exclusive right within that area, under an exclusive license or other transfer of copyright, to transmit the same performance or display of the work, and

(B) the transmitter having the exclusive right or any other copyright owner has given written notice of such exclusive right to the secondary transmitter at least 10 days before the primary transmission, in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(c) LIMITATIONS ON LIABILITY FOR CERTAIN SECONDARY TRANSMISSIONS.—

(1) Subject to the provisions of subsection (b), in the following cases involving a secondary transmission to the public of a primary transmission embodying a performance or display of a work, liability of the secondary transmitter for infringement under section 501 does not include the remedies provided by sections 502, 503, and 506, and its liability for the remedies provided by sections 504 and 505 is limited as provided by clause (2) of this subsection:

(A) where the secondary transmission is outside the scope of subclause

(B) of subsection (b)(5), but comes within the scope of subclause (A) of subsection (b)(6) and the secondary transmitter has not been given notice as provided by subclause (B) of subsection (b)(6); or

(B) where the secondary transmission is outside the scope of subclause (B) of subsection (b)(5) and of subsection (b)(6), but is made for reception wholly or partly outside the limits of the area normally encompassed by the primary transmission, and—

(i) the secondary transmission is made for reception wholly or partly within the limits of an area normally encompassed by one or more transmitting facilities, other than the primary transmitter, if no such facility has the exclusive right within that area, under an exclusive license or other transfer of copyright, to transmit the same performance or display of the work; or

(ii) the secondary transmission is made for reception wholly or partly within the limits of an area not normally encompassed by any transmitting facility.

(2) In any case coming within the scope of subclauses (A) or (B) of clause (1) of this subsection, the infringer's liability under section 504 does not include any of the infringer's profits, and the copyright owner's right to recover damages is, except as provided in subclauses (A) and (B) of this clause, limited to recovery of a reasonable license fee, as found by the court under the circumstances of the case.

(A) where the court finds that the infringer has refused or failed to accept an offer of a license for a reasonable fee,

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in writing and signed by the copyright owner, it shall award as statutory damages under section 504(c) a sum of \$250, but if three times the amount of a reasonable license fee exceeds \$250, then not less than \$250 or more than three times the amount of a reasonable license fee, as the court considers just, to which may be added a discretionary award of costs and attorney's fees under section 505;

(B) where the court finds that the copyright owner has refused or failed to accept the written offer, accompanied by a tender, of a reasonable license fee, it may in its discretion award costs and attorney's fees under section 505 to the infringer, and may reduce or withhold any award of damages under section 504.

(d) DEFINITIONS.—As used in this section, the following terms and their variant forms mean the following:

(1) A "primary transmission" is one made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted.

(2) A "secondary transmission" is the further transmitting of a primary transmission simultaneously with the primary transmission.

(3) An area is "adequately served" when it is normally encompassed by transmitting facilities that regularly transmit to the public at large a preponderance of the transmission pro-

grams regularly transmitted by each of the major broadcasting networks (or similar organizations) to transmitting facilities throughout the continental United States. The Register of Copyrights may, by regulation, further particularize this definition, taking into account any pertinent definition in a Federal statute or regulation.

§ 112. Limitations on exclusive rights: Ephemeral recordings

(a) Notwithstanding the provisions of section 106, and except in the case of a motion picture or other audiovisual work, it is not an infringement of copyright for a transmitting organization entitled to transmit to the public a performance or display of a work, under a license or transfer of the copyright or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make no more than one copy or phonorecord of a particular transmission program embodying the performance or display, if—

(1) the copy or phonorecord is retained and used solely by the transmitting organization that made it, and no further copies or phonorecords are reproduced from it; and

(2) the copy or phonorecord is used solely for the transmitting organization's own transmissions within the area normally encompassed by its transmissions, or for purposes of archival preservation or security; and

(3) unless preserved exclusively for archival purposes, the copy or phonorecord is destroyed within six months

[No parallel provision.]

§ 110. Limitations on exclusive rights: Ephemeral recordings

Notwithstanding the provisions of section 106, it is not an infringement of copyright for an organization lawfully entitled to transmit a performance or exhibition of a copyrighted work to the public to make no more than one copy or phonorecord of the work solely for purposes of the organization's own lawful transmission or for archival preservation, if the copy or phonorecord is not used for transmission after six months from the date it was first made, and is thereafter destroyed or preserved for archival purposes only.

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from the date the transmission program was first transmitted to the public.

(b) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance or display of a work, under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make no more than two copies or phonorecords of a particular transmission program embodying the performance or display, if—

(1) no further copies or phonorecords are reproduced from the copies or phonorecords made under this clause; and

(2) where only one copy or phonorecord is made, it is used solely for transmissions under section 110(2) or for purposes of archival preservation or security; and

(3) where two copies or phonorecords are made, one is used solely for transmissions under section 110(2) and the other is used solely for purposes of archival preservation or security; and,

(4) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are destroyed within one year from the date the transmission program was first transmitted to the public.

(c) The transmission program embodied in a copy or phonorecord made under this section is not subject to protection as a derivative work under this title except with the express consent of the owners of copy-

right in the pre-existing works employed in the program.

§ 113. Scope of exclusive rights in pictorial, graphic, and sculptural works

(a) Subject to the provisions of clauses (1) and (2) of this subsection, the exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work in copies under section 106 includes the right to reproduce the work in or on any kind of article, whether useful or otherwise.

(1) This title does not afford, to the owner of copyright in a work that portrays a useful article as such, any greater rights with respect to the making, distribution, or display of the useful article so portrayed than those afforded to such copyrighted works under the law in effect on December 31, 1968.

(2) In the case of a work lawfully reproduced in useful articles that have been offered for sale or other distribution to the public, copyright does not include any right to prevent the making, distribution, or display of pictures or photographs of such articles in connection with advertisements or commentaries relating to the distribution or display of such articles, or in connection with news reports.

(b) A "useful article" is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a "useful article."

[No parallel provision.]

§ 111. Scope of exclusive rights in pictorial, graphic, and sculptural works

(a) Subject to the provisions of clauses (1) and (2) of this subsection, the exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work in copies under section 106 includes the right to reproduce the work in or on any kind of article, whether useful or otherwise.

(1) This title does not afford, to the owner of copyright in a work that portrays a useful article as such, any greater rights with respect to the making, distribution, or exhibition of the useful article so portrayed than those afforded to such copyrighted works under the law in effect on December 31, 1966.

(2) In the case of a work lawfully reproduced in useful articles that have been offered for sale or other distribution to the public, copyright does not include any right to prevent the making, distribution, or exhibition of pictures or photographs of such articles in connection with advertisements or commentaries relating to the distribution or exhibition of such articles, or in connection with news reports.

(b) A "useful article" is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a "useful article."

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No parallel provision.

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§ 114. Scope of exclusive rights in sound recordings

- (a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1) and (3) of section 106, and do not include any right of performance under section 106(4).
- (b) The exclusive right of the owner of copyright in a sound recording to reproduce it under section 106(1) is limited to the right to duplicate the sound recording in the form of phonorecords that directly or indirectly recapture the actual sounds fixed in the recording. This right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.
- (c) This section does not limit or impair the exclusive right to perform publicly, by means of a phonorecord, any of the works specified by section 106(4).

§ 115. Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords

In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.

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§ 112. Scope of exclusive rights in sound recordings

- (a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1) and (3) of section 106(a), and do not include any right of performance under section 106(a)(4).
- (b) The exclusive right of the owner of copyright in a sound recording to reproduce it under section 106(a)(1) is limited to the right to duplicate the sound recording in the form of phonorecords that directly or indirectly recapture the actual sounds fixed in the recording. This right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.
- (c) This section does not limit or impair the exclusive right to perform publicly, by means of a phonorecord, any of the work specified by section 106(a)(4).

§ 113. Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords

In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106(a), to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.

§ 1. * * * * *

(e) * * * * * And as a condition of extending the copyright control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work

(a) AVAILABILITY AND SCOPE OF COMPULSORY LICENSE.—

(1) When phonorecords of a non-dramatic musical work have been distributed to the public under the authority of the copyright owner, any other person may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his primary purpose in making phonorecords is to distribute them to the public for private use.

upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the 20th day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the 20th of the next succeeding month. The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit. It shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.

In case of failure of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand, the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the

(a) AVAILABILITY AND SCOPE OF COMPULSORY LICENSE.—

(1) When phonorecords of a non-dramatic musical work have been distributed to the public under the authority of the copyright owner, any other person may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his primary purpose in making phonorecords is to distribute them to the public for private use.

(2) A compulsory license includes the privilege of making a musical arrangement of the work to the extent

necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work,

(2) A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the per-

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formance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.

(b) NOTICE OF INTENTION TO OBTAIN COMPULSORY LICENSE; DESIGNATION OF OWNER OF PERFORMANCE RIGHT.—

(1) Any person who wishes to obtain a compulsory license under this section shall, before or within thirty days after making, and before distributing any phonorecords of the work, serve notice of his intention to do so on the copyright owner. If the registration or other public records of the Copyright Office do not identify the copyright owner and include an address at which notice can be served on him, it shall be sufficient to file the notice of intention in the Copyright Office. The notice shall comply, in

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terms of this title, not exceeding three times such amount.

* * * * *
§ 101. * * * * *

(c) ROYALTIES FOR USE OF MECHANICAL REPRODUCTION OF MUSICAL WORKS.—

Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damages a royalty as provided in section 1, subsection (e), of this title: *Provided also*, That whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice; and in case of his failure so to do the court may, in its

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and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.

(b) NOTICE OF INTENTION TO OBTAIN COMPULSORY LICENSE.—

(1) Any person who wishes to obtain a compulsory license under this section shall, before or within thirty days after making, and before distributing any phonorecords of the work, serve notice of his intention to do so on the copyright owner. If the registration or other public records of the Copyright Office do not identify the copyright owner and include an address at which notice can be served on him, it shall be sufficient to file the notice of intention in the Copyright Office. The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

discretion, in addition to sums hereinabove mentioned, award the complainant a further sum, not to exceed three times the amount provided by section 1, subsection (c), of this title, by way of damages, and not as a penalty, and also a temporary injunction until the full award is paid.

form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(2) If the copyright owner so requests in writing not later than ten days after service or filing of the notice required by clause (1), the person exercising the compulsory license shall designate, on a label or container accompanying each phonorecord of the work distributed by him, and in the form and manner that the Register of Copyrights shall prescribe by regulation, the name of the copyright owner or his agent to whom royalties for public performance of the work are to be paid.

(3) Failure to serve or file the notice required by clause (1), or to designate the name of the owner or agent as required by clause (2), forecloses the possibility of a compulsory license and, in the absence of a negotiated license, renders the making and distribution of phonorecords actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506.

(c) ROYALTY PAYABLE UNDER COMPULSORY LICENSE.—

(1) To be entitled to receive royalties under a compulsory license, the copyright owner must be identified in the registration or other public records of the Copyright Office. The owner is entitled to royalties for phonorecords made after he is so identified but he is not entitled to recover for any phonorecords previously made.

(2) Failure to serve or file the notice as required in clause (1) forecloses the possibility of a compulsory license and, in the absence of a negotiated license, renders the making and distribution of phonorecords fully actionable as acts of infringement under section 501.

(c) ROYALTY PAYABLE UNDER COMPULSORY LICENSE.—

(1) To be entitled to receive royalties under a compulsory license, the copyright owner must be identified in the registration or other public records of the Copyright Office. The owner is entitled to royalties for phonorecords made after he is so identified but he is not entitled to recover for any phonorecords previously made.

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(2) Except as provided by clause (1), the royalty under a compulsory license shall be payable for every phonorecord made in accordance with the license. With respect to each work embodied in the phonorecord, the royalty shall be either two and one-half cents, or one-half cent per minute of playing time or fraction thereof, whichever amount is larger.

(3) Royalty payments shall be made quarterly, in January, April, July, and October, and shall include all royalties for the three months next preceding. Each quarterly payment shall be accompanied by a detailed statement of account, which shall include such pertinent information as the Register of Copyrights may prescribe by regulation, and which, upon written demand by the copyright owner, shall be certified as correct by a certified public accountant licensed to practice in the United States.

(4) If the copyright owner does not receive the quarterly payment and statement of account when due, he may give written notice to the licensee that, unless the default is remedied within thirty days from the date of the notice, the compulsory license will be automatically terminated. Such termination renders the making and distribution of all phonorecords, for which the royalty had not been paid, actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506.

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(1), the royalty under a compulsory license shall be payable for every phonorecord made in accordance with the license. With respect to each work embodied in the phonorecord, the royalty shall be either three cents, or one cent per minute of playing time or fraction thereof, whichever amount is larger.

(3) Royalty payments shall be made quarterly, in January, April, July, and October, and shall include all royalties for the three months next preceding. Each quarterly payment shall be accompanied by a detailed statement of account which, upon written demand by the copyright owner, shall be certified as correct by a certified public accountant licensed to practice in the United States.

(4) If the copyright owner does not receive the quarterly payment and statement of account when due, he may give written notice to the licensee that, unless the default is remedied within thirty days from the date of the notice, the compulsory license will be automatically terminated. Such termination renders the making and distribution of all phonorecords, for which the royalty had not been paid, fully actionable as acts of infringement under section 501.

§ 116. Scope of exclusive rights in nondramatic musical works: Public performance by means of coin-operated phonorecord players

(a) **LIMITATIONS ON EXCLUSIVE RIGHT.**—In the case of a nondramatic musical work embodied in a phonorecord, the exclusive right under clause (4) of section 106 to perform the work publicly by means of a coin-operated phonorecord player is limited as follows:

(1) The proprietor of the establishment in which the public performance takes place is not liable for infringement with respect to such public performance unless:

(A) he is the operator of the phonorecord player; or
 (B) he refuses or fails, within one month after receipt by registered or certified mail of a request by the copy-right owner, to make full disclosure, by registered or certified mail, of the identity of the operator of the phonorecord player.

(2) The operator of the coin-operated phonorecord player may obtain a compulsory license to perform the work publicly on that phonorecord player by recording the statements and affixing the certificate provided by subsection (b), and by paying the royalties provided by subsection (c).

(b) **RECORDATION OF COIN-OPERATED PHONORECORD PLAYER AND AFFIXATION OF CERTIFICATE.**—

(1) Any operator who wishes to obtain a compulsory license for the public performance of nondramatic musical works

§ 1(e) * * * The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs.

§ 114. Scope of exclusive rights in nondramatic musical works: Performance by means of coin-operated machine

The proprietor of an establishment in which a copyrighted nondramatic musical work is performed publicly by means of a coin-operated machine is not an infringer unless:

(1) alone or jointly with others he owns the machine or has power to exercise primary control over it; or

(2) he refuses or fails, promptly after receipt by registered or certified mail of a request by the copyright owner, to make full disclosure of the identity of the person who owns the machine or has power to exercise primary control over it.

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on a coin-operated phonorecord player shall fulfill the following requirements:

(A) Before or within one month after such performances on a particular phonorecord player are made available in a particular establishment, and during the month of January in each succeeding year, he shall record in the Copyright Office, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, a statement of the name and address of the operator of the phonorecord player, the manufacturer and serial number or other explicit identification of the phonorecord player, the capacity of the phonorecord player (i.e., the total number of musical works normally capable of being made available in it at any one time for performance), and the name and address of the establishment in which it is located. The statement recorded each January shall be accompanied by a complete list identifying, by their titles and any other indicia that the Register of Copyrights may prescribe by regulation, all the musical works made available in the phonorecord player for performance during each of the calendar quarters of the preceding year, other than any works whose public performance by means of that phonorecord player during the particular quarter was expressly licensed by an instrument in writing and signed by the copyright owner or his agent.

(B) He shall keep affixed to the particular phonorecord player, in a position where it can be readily examined by the public, a certificate, issued by the Copyright Office, of the latest rec- ordation made by him under subclause (A) of this clause with respect to that phonorecord player.

(2) Failure to record the statements or to affix the certificate required by clause

(1) of this subsection renders the public performance actionable as an act of infringement under section 501 and fully subject to the remedies provided by sec- tions 502 through 506.

(c) ROYALTY PAYABLE UNDER COM- PULSORY LICENSE.—

(1) To be entitled to receive royalties under a compulsory license as provided by this section, the copyright owner or his agent to whom royalties for public performance of the work are to be paid:

(A) must have required that phono- records of the work distributed under his authority or under section 115 bear his name on a label or container ac- companying the phonorecords, and must have recorded his address in the Copyright Office, in accordance with regulations that the Register of Copy- rights shall prescribe with respect to such name and address; or

(B) must serve upon the operator, not later than December 31 of the fol- lowing year, a written claim specifying all of the works for which royalties are payable to him by the operator for any three-month period. The claim shall comply in form, content, and manner of service with requirements that the

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Register of Copyrights shall prescribe by regulation.

(2) Unless the parties have agreed otherwise in a written instrument signed by them, the royalty under the compulsory license for any one work shall be either of the following amounts, whichever is less, for each three-month period or fraction thereof that the work has been available for performance on the particular phonorecord player:

(A) 3 cents, or
 (B) a prorated amount calculated by first multiplying 3 cents by the capacity of the phonorecord player as shown in the statement required by clause (1)(A) of subsection (b), and then dividing the product of that multiplication by the total number of works actually made available in the phonorecord player for performance during any part of the three-month period.

(3) Where the name and address of the copyright owner or his agent are made known as provided by subclause (A) of clause (1), royalty payments shall be made quarterly, in January, April, July, and October, and shall include all royalties for the three-month period next preceding. Each quarterly payment shall be accompanied by a detailed statement of account which shall include a complete list identifying, by their titles and any other indicia that the Register of Copyrights may prescribe by regulation, all the musical works made available in the phonorecord player for performance during any part of the three-month period, other than any works whose public performance by means of that phonorecord player during the particular quarter was expressly licensed by an instru-

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ment in writing and signed by the copy-right owner or his agent.

(4) Where a claim for royalties is served upon the operator as provided by subclause (B) of clause (1), payment of the royalties owing under the claim shall be made within four months after service of the claim.

(5) Failure to make the royalty payment with the accompanying statement of account as required by clause (3), or failure to make the royalty payment as required by clause (4), renders all public performances of the work by that phonorecord player during the three-month period for which such payment is in default actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506.

(6) For the purpose of this section, every musical work whose title appears on the list referred to by subclause (D) of subsection (e)(1) during any part of a three-month period is conclusively presumed to have been publicly performed at least once during that period by means of the phonorecord player which the list accompanies.

(d) CRIMINAL PENALTIES.—Any person who knowingly makes a false representation of a material fact in a statement or accompanying list recorded under clause (1)(A) of subsection (b), or in a written claim served under clause (1)(B) of subsection (c), or in a statement of account required by clause (3) of subsection (c), or who knowingly alters a certificate issued under clause (1)(B) of subsection (b) or knowingly affixes such a certificate to a phonorecord player other than the one it covers, shall be fined not more than \$2,500.

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(e) DEFINITIONS.—As used in this section, the following terms and their variant forms mean the following:

(1) A “coin-operated phonorecord player” is a machine or device that:

(A) is employed solely for the performance of nondramatic musical works by means of phonorecords upon being activated by the insertion of a coin;

(B) is located in an establishment making no direct or indirect charge for admission;

(C) is incapable of transmitting the performance beyond the establishment in which it is located;

(D) is accompanied by a list of the titles of all the musical works available for performance on it, which list is affixed to the phonorecord player or posted in the establishment in a prominent position where it can be readily examined by the public; and

(E) affords a choice of works available for performance and permits the choice to be made by the patrons of the establishment in which it is located.

(2) An “operator” is any person who, alone or jointly with others:

(A) owns a coin-operated phonorecord player; or

(B) has the power to make a coin-operated phonorecord player available for placement in an establishment for purposes of public performance; or

(C) has the power to exercise primary control over the selection of the musical works made available for

public performance in a coin-operated phonorecord player.

§ 201. Ownership of copyright

(a) **INITIAL OWNERSHIP.**—Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.

(b) **WORKS MADE FOR HIRE.**—In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

(c) **CONTRIBUTIONS TO COLLECTIVE WORKS.**—Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, and any revision of that collective work, and any later collective work in the same series.

(d) **TRANSFER OF OWNERSHIP.**—
 (1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

§ 9. AUTHORS OR PROPRIETORS, ENTITLED: ALIENS.—The author or proprietor of any work made the subject of copyright by this title, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in this title * * *

§ 26. * * * the word "author" shall include an employer in the case of works made for hire.

§ 3. PROTECTION OF COMPONENT PARTS OF WORK COPYRIGHTED: COMPOSITE WORKS OR PERIODICALS.—The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title.

§ 28. ASSIGNMENTS AND BEQUESTS.—
 Copyright secured under this title or previous copyright laws of the United States may be assigned, granted, or mortgaged by an instrument in writing signed by the proprietor of the copyright, or may be bequeathed by will.

§ 201. Ownership of copyright

(a) **INITIAL OWNERSHIP.**—Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.

(b) **WORKS MADE FOR HIRE.**—In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise, owns all of the rights comprised in the copyright.

(c) **CONTRIBUTIONS TO COLLECTIVE WORKS.**—Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, and any revision of that collective work, and any later collective work in the same series.

(d) **TRANSFER OF OWNERSHIP.**—
 (1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

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(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

§ 202. Ownership of copyright as distinct from ownership of material object

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

§ 203. Termination of transfers and licenses granted by the author

(a) CONDITIONS FOR TERMINATION.—In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1968,

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[No parallel clause.]

§ 27. COPYRIGHT DISTINCT FROM PROPERTY IN OBJECT, AND OF ASSIGNMENT OF COPYRIGHT.—The copyright is distinct from the property in the material object copyrighted, and the sale or conveyance by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object, but nothing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.

§ 24. DURATION; RENEWAL AND EXTENSION.—The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *Provided*, That in the

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(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

§ 202. Ownership of copyright as distinct from ownership of material object

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any exclusive rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

§ 203. Termination of transfers and licenses granted by the author

(a) CONDITIONS FOR TERMINATION.—In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1,

otherwise than by will, is subject to termination under the following conditions:

(1) In the case of a grant executed by one author, termination of the grant may be effected by that author or, if he is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one half of that author's termination interest. In the case of a grant executed by two or more authors of a joint work, termination of the grant may be effected by a majority of the authors who executed it; if any of such authors is dead, his termination interest may be exercised as a unit by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one half of his interest.

case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (other-wise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication.

1967, otherwise than by will, is subject to termination under the following conditions:

(1) Termination of the grant may be effected by the author who executed it. If the author is dead, termination may be effected by his widow (or her widower) and children; the children of any dead child of the author succeed to the right of their parent for this purpose.

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(2) Where an author is dead, his termination interest is owned, and may be exercised, by his widow (or her widower) and children or grandchildren as follows:

(A) The widow owns his entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow owns one half of his interest;

(B) The author's surviving children, and the surviving children of any dead child of the author, own his entire termination interest unless there is a widow (or widower), in which case the ownership of one half of his interest is divided among them;

(C) The rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of his children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of 35 years from the date of execution of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of 35 years from the date of publication of the work under the grant or at the end of 40 years from the date of execution of the grant, whichever term ends earlier.

(4) The termination shall be effected by serving an advance notice in writing,

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(2) Termination of the grant may be effected at any time during a period of five years beginning at the end of 35 years from the date of execution of the grant; or, if the grant covers the right of first publication of the work, the period begins at the end of 35 years from the date of first publication of the work or at the end of 40 years from the date of execution of the grant, whichever term ends earlier.

(3) The termination shall be effected by serving an advance notice in writing,

signed by the author or, if he is dead, by all of those entitled to terminate his grant under clause (1) of this subsection, or by their duly authorized agents, upon the grantee or his successor in title.

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(b) EFFECT OF TERMINATION.—Upon the effective date of termination, all rights under this title that were covered by the terminated grant revert to the author, authors, and other persons owning termination interests under clauses (1) and (2) of subsection (a), including those owners who did not join in signing the notice of termination under clause (4) of subsection (a), but with the following limitations:

(1) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termina-

tion, if he is dead, by all of those entitled to terminate his grant under clause (1) of this subsection, or by their duly authorized agents, upon the grantee or his successor in title.

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (2) of this subsection, and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(4) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(b) EFFECT OF TERMINATION.—Upon the effective date of termination, all rights under this title that were covered by the terminated grant revert to the author or, if he is dead, to all of those entitled to terminate his grant under clause (1) of subsection (a), but with the following limitations:

(1) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termina-

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 tion, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

(2) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of subsection (a). The rights vest in the author, authors, and other persons named in, and in the proportionate shares provided by, clauses (1) and (2) of subsection (a).

(3) Subject to the provisions of clause (4) of this subsection, a further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is signed by the same number and proportion of the owners, in whom the right has vested under clause (2) of this subsection, as are required to terminate the grant under clauses (1) and (2) of subsection (a). Such further grant or agreement is effective with respect to all of the persons in whom the right it covers has vested under clause (2) of this subsection, including those who did not join in signing it. If any person dies after rights under a terminated grant have vested in him, his legal representatives, legatees, or heirs at law represent him for purposes of this clause.

(4) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, how-

tion, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

(2) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the persons effecting the termination and the original grantee or his successor in title, after the notice of termination has been served as provided by clause (3) of subsection (a).

(3) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (3) of subsection (a). Where the rights revert to the author's widow and one or more of his children or grand-

ever, an agreement for such a further grant may be made between the persons provided by clause (3) of this subsection and the original grantee or his successor in title, after the notice of termination has been served as provided by clause (4) of subsection (a).

(5) Termination of a grant under this section affects only those rights covered by the grant that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws.

(6) Unless and until termination is effected under this section, the grant, if it does not provide otherwise, continues in effect for the term of copyright provided by this title.

§ 204. Execution of transfers of copyright ownership

(a) A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or his duly authorized agent.

(b) A certificate of acknowledgment is not required for the validity of a transfer, but is prima facie evidence of the execution of the transfer if:

- (1) in the case of a transfer executed in the United States, the certificate is issued by a person authorized to administer oaths within the United States; or
- (2) in the case of a transfer executed in a foreign country, the certificate is issued

children, the widow is entitled to a one-half interest in the reverted rights. The interests of the author's children and grandchildren shall in all cases be divided among them on a per stirpes basis according to the number of his children represented.

(4) Termination of a grant under this section shall affect only those rights covered by the grant that arise under this title, and shall in no way affect rights arising under any other Federal, State, or foreign laws.

(5) Unless and until termination is effected under this section, the grant, if it does not provide otherwise, continues in effect for the term of copyright provided in this title.

§ 204. Execution of transfers of copyright ownership

(a) A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or his duly authorized agent.

(b) A certificate of acknowledgment is not required for the validity of a transfer, but is prima facie evidence of the execution of the transfer if:

- (1) in the case of a transfer executed in the United States, the certificate is issued by a person authorized to administer oaths within the United States; or
- (2) in the case of a transfer executed in a foreign country, the certificate is

§ 28. ASSIGNMENTS AND BEQUESTS.—Copyright secured under this title or previous copyright laws of the United States may be assigned, granted, or mortgaged by an instrument in writing, signed by the proprietor of the copyright, or may be bequeathed by will.

§ 29. SAME; EXECUTED IN FOREIGN COUNTRY; ACKNOWLEDGMENT AND CERTIFICATE.—Every assignment of copyright executed in a foreign country shall be acknowledged by the assignor before a consular officer or secretary of legation of the United States authorized by law to administer oaths or perform notarial acts. The certificate of such acknowledgment under the hand and official seal of such consular officer or secretary of legation shall

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by a diplomatic or consular officer of the United States, or by a person authorized to administer oaths whose authority is proved by a certificate of such an officer.

§ 205. Recordation of transfers and other documents

(a) **CONDITIONS FOR RECORDATION.**—Any transfer of copyright ownership or other document pertaining to a copyright may be recorded in the Copyright Office if the document filed for recordation bears the actual signature of the person who executed it, or if it is accompanied by a sworn or official certification that it is a true copy of the original, signed document.

(b) **CERTIFICATE OF RECORDATION.**—The Register of Copyrights shall, upon receipt of a document as provided by subsection (a) and of the fee provided by section 708, record the document and return it with a certificate of recordation.

(c) **RECORDATION AS CONSTRUCTIVE NOTICE.**—Recordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document, but only if:

(1) the document, or material attached to it, specifically identifies the work to which it pertains so that, after the document is indexed by the Register of Copyrights, it would be revealed by a reasonable search under the title or

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be prima facie evidence of the execution of the instrument.

§ 30. **SAME; RECORD.**—Every assignment of copyright shall be recorded in the copyright office within three calendar months after its execution in the United States or within six calendar months after its execution without the limits of the United States, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded.

§ 31. **SAME; CERTIFICATE OF RECORD.**—The Register of Copyrights shall, upon payment of the prescribed fee, record such assignment, and shall return it to the sender with a certificate of record attached under seal of the copyright office, and upon the payment of the fee prescribed by this title he shall furnish to any person requesting the same a certified copy thereof under the said seal.

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issued by a diplomatic or consular officer of the United States, or by a person authorized to administer oaths, whose authority is proved by a certificate of such an officer.

§ 205. Recordation of transfers and other documents

(a) **CONDITIONS FOR RECORDATION.**—Any transfer of copyright ownership or other document pertaining to a copyright may be recorded in the Copyright Office if the document filed for recordation bears the actual signature of the person who executed it, or if it is accompanied by a sworn or official certification that it is a true copy of the original, signed statement.

(b) **CERTIFICATE OF RECORDATION.**—The Register of Copyrights shall, upon receipt of a document as provided by subsection (a) and of the fee provided by section 708, record the document and return it with a certificate of recordation.

(c) **RECORDATION AS CONSTRUCTIVE NOTICE.**—Recordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document, but only if:

(1) the document, or material attached to it, specifically identifies the work to which it pertains so that, after the document is indexed by the Register of Copyrights, it would be revealed by a reasonable search under the title or registra-

registration number of the work; and
 (2) registration has been made for the work.

(d) RECORDATION AS PREREQUISITE TO INFRINGEMENT SUIT.—No person claiming by virtue of a transfer to be the owner of copyright or of any exclusive right under a copyright is entitled to institute an infringement action under this title until the instrument of transfer under which he claims has been recorded in the Copyright Office, but suit may be instituted after such rec- ordation on a cause of action that arose before rec- ordation.

(e) PRIORITY BETWEEN CONFLICTING TRANSFERS.—As between two conflicting transfers, the one executed first prevails if it is recorded, in the manner required to give constructive notice under subsection (c), within one month after its execution in the United States or within two months after its execution abroad, or at any time before rec- ordation in such manner of the later transfer. Otherwise the later transfer prevails if recorded first in such manner, and if taken in good faith, for valuable con- sideration or on the basis of a binding promise to pay royalties, and without notice of the earlier transfer.

(f) PRIORITY BETWEEN CONFLICTING TRANSFER OF OWNERSHIP AND NONEX- CLUSIVE LICENSE.—A nonexclusive license, whether recorded or not, prevails over a conflicting transfer of copyright ownership if the license is evidenced by a written instrument signed by the owner of the rights licensed or his duly authorized agent, and if:

tion number of the work; and
 (2) registration, as provided by sec- tion 407, has been made for the work.

(d) RECORDATION AS PREREQUISITE TO INFRINGEMENT SUIT.—No person claiming by virtue of a transfer to be the owner of copyright or of any exclusive right under a copyright is entitled to institute an in- fringement action under this title until the instrument of transfer under which he claims has been recorded in the Copyright Office, but suit may be instituted after such rec- ordation on a cause of action that arose before rec- ordation.

(e) PRIORITY BETWEEN CONFLICTING TRANSFERS.—As between two conflicting transfers, the one executed first prevails if it is recorded within two months after its execution in the United States or within four months after its execution abroad, or at any time before rec- ordation of the later transfer. Otherwise the later transfer pre- vails if recorded first, and if taken in good faith, for valuable consideration or on the basis of a binding promise to pay royalties, and without notice of the earlier transfer.

(f) PRIORITY BETWEEN CONFLICTING TRANSFER OF OWNERSHIP AND NON- EXCLUSIVE LICENSE.—A non-exclusive li- cense, whether recorded or not, prevails over a conflicting transfer of copyright ownership if:

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- (1) the license was taken before execution of the transfer; or
- (2) the license was taken in good faith before recordation of the transfer and without notice of it.

§ 301. Pre-emption with respect to other laws

(a) On and after January 1, 1969, all rights in the nature of copyright in works that come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to copyright, literary property rights, or any equivalent legal or equitable right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to:

- (1) unpublished material that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression;
- (2) any cause of action arising from undertakings commenced before January 1, 1969;
- (3) activities violating rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106, including breaches of contract, breaches of

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§ 2. RIGHTS OF AUTHOR OR PROPRIETOR OF UNPUBLISHED WORK.—Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.

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- (1) the license was taken before execution of the transfer; or
- (2) the license was taken in good faith before recordation of the transfer and without notice of it.

§ 301. Pre-emption with respect to other laws

(a) On and after January 1, 1967, all rights in the nature of copyright in works that come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to copyright, literary property rights, or any equivalent legal or equitable right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the law of any State with respect to:

- (1) unpublished material that does not come within the subject matter of copyright as specified by sections 102 and 103;
- (2) any cause of action arising from undertakings commenced before January 1, 1967;
- (3) activities violating rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106, including breaches of contract, breaches of

trust, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation.

§ 302. Duration of copyright: Works created on or after January 1, 1969

(a) **IN GENERAL.**—Copyright in a work created on or after January 1, 1969, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 50 years after his death.

(b) **JOINT WORKS.**—In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author and 50 years after his death.

(c) **ANONYMOUS WORKS, PSEUDONYMOUS WORKS, AND WORKS MADE FOR HIRE.**—In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 75 years from the year of its first publication, or a term of 100 years from the year of its creation, whichever expires first. If, before the end of such term, the identity of one or more of the authors of any anonymous or pseudonymous work is revealed in the records of a registration made for that work under subsections (a) or (d) of section 407, or in the records provided by this subsection, the copyright in the work endures for the term specified by subsections (a) or (b), based on the life of the author or authors whose identity has been revealed. Any person having an interest in the copyright in an anonymous or pseudonymous work may at any time record, in records to be maintained by the

§ 24. DURATION; RENEWAL AND EXTENSION.—The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *Provided*, That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-

trust, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation.

§ 302. Duration of copyright: Works created on or after January 1, 1967

(a) **IN GENERAL.**—Copyright in a work created on or after January 1, 1967, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 50 years after his death.

(b) **JOINT WORKS.**—In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the second of the authors to die and 50 years after his death.

(c) **ANONYMOUS WORKS, PSEUDONYMOUS WORKS, AND WORKS MADE FOR HIRE.**—In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 75 years from the year of its first publication, or a term of 100 years from the year of its creation, whichever expires first. If, before the end of such term, the identity of one or more of the authors of an anonymous or pseudonymous work is revealed in the registration or other public records of the Copyright Office, the copyright in such work endures for the term specified by subsections (a) or (b), based on the life of the author or authors whose identity has been revealed.

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eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication.

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Copyright Office for that purpose, a statement identifying one or more authors of the work; the statement shall also identify the person filing it, the nature of his interest, the source of his information, and the particular works affected, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation.

(d) RECORDS RELATING TO DEATH OF AUTHORS.—Any person having an interest in a copyright may at any time record in the Copyright Office a statement of the date of death of the author of the copyrighted work, or a statement that the author is still living on a particular date. The statement shall identify the person filing it, the nature of his interest, and the source of his information, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation. The Register shall maintain current records of information relating to the death of authors of copyrighted works, based on such recorded statements and, to the extent he considers practicable, on data contained in any of the records of the Copyright Office or in other reference sources.

(e) PRESUMPTION AS TO AUTHOR'S DEATH.—After a period of 75 years from the year of first publication of a work, or a period of 100 years from the year of its creation, whichever expires first, any person who obtains from the Copyright Office a certified report that the records provided by subsection (d) disclose nothing

(d) RECORDS RELATING TO DEATH OF AUTHORS.—Any person having an interest in a copyright may at any time record in the Copyright Office a statement of the date of death of the author of the copyrighted work, or a statement that the author is still living on a particular date. The statement shall identify the person filing it, the nature of his interest, and the source of his information, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation. The Register shall maintain current records of information relating to the death of authors of copyrighted works, based on such recorded statements and, to the extent he considers practicable, on data contained in any of the records of the Copyright Office or in other reference sources.

(e) PRESUMPTION AS TO AUTHOR'S DEATH.—After a period of 75 years from the year of first publication of a work, or a period of 100 years from the year of its creation, whichever expires first, any person who obtains from the Copyright Office a certified report that the records provided by subsection (d) disclose nothing

to indicate that the author of the work is living, or died less than 50 years before, is entitled to the benefit of a presumption that the author has been dead for at least 50 years. Reliance in good faith upon this presumption shall be a complete defense to any action for infringement under this title.

§ 303. Duration of Copyright: Works created but not published or copyrighted before January 1, 1969

Copyright in a work created before January 1, 1969, but not theretofore in the public domain or copyrighted, subsists from January 1, 1969, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 1993; and, if the work is published on or before December 31, 1993, the term of copyright shall not expire before December 31, 2018.

§ 304. Duration of copyright: Subsisting copyrights

(a) **COPYRIGHTS IN THEIR FIRST TERM ON JANUARY 1, 1969.**—Any copyright, the first term of which is subsisting on January 1, 1969, shall endure for twenty-eight years from the date it was originally secured: *Provided*, That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal

to indicate that the author of the work is living, or died less than 50 years before, is entitled to the benefits of a presumption that the author has been dead for at least 50 years. Reliance in good faith upon this presumption shall be a complete defense to any action for infringement under this title.

§ 303. Duration of copyright: Works created but not published or copyrighted before January 1, 1967

Copyright in a work created before January 1, 1967, but not theretofore in the public domain or copyrighted, subsists from January 1, 1967, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 1990; and, if the work is published before December 31, 1990, the term of copyright shall not expire before December 31, 2015.

§ 304. Duration of copyright: Subsisting copyrights

(a) **COPYRIGHTS IN THEIR FIRST TERM ON JANUARY 1, 1967.**—The duration of any copyright, the first term of which is subsisting on January 1, 1967, is governed by the provisions of the following two clauses:

(1) The copyright shall endure for twenty-eight years from the date it was originally secured: *Provided*, That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as

§ 2. RIGHTS OF AUTHOR OR PROPRIETOR OF UNPUBLISHED WORK.—Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.

[§ 24 *supra*.]

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and extension of the copyright in such work for the further term of forty-seven years when application for such renewal and extension shall have been made to the Copyright Office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of forty-seven years when application for such renewal and extension shall have been made to the Copyright Office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in default of the registration of such application for renewal and extension, the copyright in any work shall terminate at the expiration of twenty-eight years from the date copyright was originally secured.

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assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of forty-seven years when application for such renewal and extension shall have been made to the Copyright Office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of forty-seven years when application for such renewal and extension shall have been made to the Copyright Office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in default of the registration of such application for renewal and extension, the copyright in any work shall terminate at the expiration of twenty-eight years from the date copyright was originally secured.

§ 25. RENEWAL OF COPYRIGHTS REGISTERED IN PATENT OFFICE UNDER REPEALED LAW.—Subsisting copyrights originally registered in the Patent Office prior to July 1, 1940, under section 3 of the act of June 18, 1874, shall be subject to renewal for a further term of forty-seven years in behalf of the proprietor upon application made to the Register of Copyrights within one year prior to the expiration of the original term of twenty-eight years.

(2) Subsisting copyrights originally registered in the Patent Office prior to July 1, 1940, under section 3 of the act of June 18, 1874, shall be subject to renewal for a further term of forty-seven years in behalf of the proprietor upon application made to the Register of Copyrights within one year prior to the expiration of the original term of twenty-eight years.

(b) COPYRIGHTS IN THEIR RENEWAL TERM OR REGISTERED FOR RENEWAL BEFORE JANUARY 1, 1969.—The duration of any copyright, the renewal term of which is subsisting at any time between December 31, 1967, and December 31, 1968, inclusive, or for which renewal registration is made between December 31, 1967, and December 31, 1968, inclusive, is extended to endure for a term of 75 years from the date copyright was originally secured.

(b) COPYRIGHTS IN THEIR RENEWAL TERM ON DECEMBER 31, 1965 OR RE-NEWED BEFORE JANUARY 1, 1967.—The duration of any copyright, the renewal term of which is subsisting on December 31, 1965, or which is renewed between December 31, 1965, and December 31, 1966, inclusive, is extended to endure for a term of 75 years from the date copyright was originally secured.

[Section 24 of the Act of March 4, 1909, 35 Stat. 1080, which made it possible to extend the renewal terms of subsisting copyrights from 14 to 28 years, reads as follows:

(c) TERMINATION OF TRANSFERS AND LICENSES COVERING EXTENDED RENEWAL TERM.—In the case of any copyright subsisting in either its first or renewal term on January 1, 1969, other than a copyright in a work made for hire, the exclusive or non-exclusive grant or a transfer or license of the renewal copyright of any right in it, executed before January 1, 1969, by any of the persons designated by the second proviso of subsection (a) of this section, otherwise than by will, is subject to termination under the following conditions:

(c) TERMINATION OF TRANSFERS AND LICENSES COVERING EXTENDED RENEWAL TERM.—In the case of any copyright subsisting in either its first or renewal term on January 1, 1967, other than a copyright in a work made for hire, the exclusive or non-exclusive grant of a transfer or license of the renewal copyright or of any right under it, executed before January 1, 1967, by any of the persons designated by the second proviso of subsection (a) (1) of this section, otherwise than by will, is subject to termination under the following conditions:

Sec. 24. That the copyright subsisting in any work at the time when this Act goes into effect may, at the expiration of the term provided for under existing law, be renewed and extended by the author of such work if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then by the author's executors, or in the absence of a will, his next of kin, for a further period such that the entire term shall be equal to that secured by this Act, including the re-

newal period: *Provided, however,* That if the work be a composite work upon which copyright was originally secured by the proprietor thereof, then such proprietor shall be entitled to the privilege of renewal and extension granted under this section: *Provided,* That application for such renewal and extension shall be made to the copyright office and duly registered therein within one year prior to the expiration of the existing term.]

(1) In the case of a grant executed by a person or persons other than the author, termination of the grant may be effected by the surviving person or persons who executed it. In the case of a grant executed by one or more of the authors of the work, termination of the grant may be effected, to the extent of a particular author's share in the ownership of the renewal copyright, by the author who executed it or, if such author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one half of that author's interest.

(2) Where an author is dead, his termination interest is owned and may be exercised by his widow (or her widower) and children or grandchildren as follows:

(A) The widow owns his entire *termination interest* unless there are any surviving children or grandchildren of the author, in which case the widow owns one half of his interest;

(1) Termination of the grant may be effected by the surviving person or persons who executed it. If, in the case of a grant executed by the author, the author is dead, termination may be effected by his widow (or her widower) and children; the children of any dead child of the author succeed to the right of their parent for this purpose.

(B) The author's surviving children, and the surviving children of any dead child of the author, own his entire termination interest unless there is a widow (or widower), in which case the ownership of one half of his interest is divided among them;

(C) The rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stripes basis according to the number of his children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of 56 years from the date copyright was originally secured, or beginning on January 1, 1969, whichever is later.

(4) The termination shall be effected by serving an advance notice in writing upon the grantee or his successor in title. In the case of a grant executed by a person or persons other than the author, the notice shall be signed by all of those entitled to terminate the grant under clause (1) of this subsection, or by their duly authorized agents. In the case of a grant executed by one or more of the authors of the work, the notice as to any one author's share shall be signed by him or his duly authorized agent or, if he is dead, by the number and proportion of the owners of his termination interest required under clauses (1) and (2) of this subsection, or by their duly authorized agents.

(2) Termination of the grant may be effected at any time during a period of five years beginning at the end of 56 years from the date copyright was originally secured.

(3) The termination shall be effected by serving an advance notice in writing, signed by all of those entitled to terminate the grant under clause (1) of this subsection, or by their duly authorized agents, upon the grantee or his successor in title.

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(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(6) In the case of a grant executed by a person or persons other than the author, all rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to all of those entitled to terminate the grant under clause (1) of this subsection. In the case of a grant executed by one or more of the authors of the work, all of a particular author's rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to that author or, if he is dead, to the persons owning his *reversionary interest* under clause (2) of this subsection, including those owners who did not join in signing the notice of termination under clause (4) of this sub-

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(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (2) of this subsection, and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(4) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(5) Upon the effective date of termination, all rights under this title that were covered by the terminated grant revert to all of those entitled to terminate the grant under clause (1) of this subsection, but with the following limitations:

section. In all cases the reversion of rights is subject to the following limitations:

(A) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

(B) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of this subsection.

(C) Where an author's rights revert to two or more persons under clause (2) of this subsection, they shall vest in those persons in the proportionate shares provided by that clause. In such a case, and subject to the provisions of subclause (D) of this clause, a further grant, or agreement to make a further grant, of a particular author's share with respect to any right covered by a terminated grant is valid only if it is signed by the same number and proportion of the owners, in whom the right has vested under this clause, as are required to terminate the grant under clause (2) of this subsection. Such further grant or agreement is effective with respect to all of the persons in whom the right it covers has vested under this subclause, including those who did not join in signing it. If

(A) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

(B) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the persons effecting the termination and the original grantee or his successor in title, after the notice of termination has been served as provided by clause (3) of this subsection.

(C) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (3) of this subsection. Where the rights revert to the author's widow and one or more of his children or grandchildren, the widow is entitled to a one-half interest in the reverted rights. The interests of the author's children and grandchildren shall in all cases be divided among them on a per stirpes basis according to the number of his children represented.

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any person dies after rights under a terminated grant have vested in him, his legal representatives, legatees, or heirs at law represent him for purposes of this subclause.

(D) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the author or any of the persons provided by the first sentence of clause (6) of this subsection, or between the persons provided by subclause (C) of this clause, and the original grantee or his successor in title, after the notice of termination has been served as provided by clause (4) of this subsection.

(E) Termination of a grant under this subsection affects only those rights covered by the grant that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws.

(F) Unless and until termination is effected under this section, the grant, if it does not provide otherwise, continues in effect for the remainder of the extended renewal term.

§ 305. Duration of copyright: Terminal date

All terms of copyright provided by sections 302 through 304 run to the end of the calendar year in which they would otherwise expire.

any person dies after rights under a terminated grant have vested in him, his legal representatives, legatees, or heirs at law represent him for purposes of this subclause.

(D) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the author or any of the persons provided by the first sentence of clause (6) of this subsection, or between the persons provided by subclause (C) of this clause, and the original grantee or his successor in title, after the notice of termination has been served as provided by clause (4) of this subsection.

(E) Termination of a grant under this subsection affects only those rights covered by the grant that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws.

(F) Unless and until termination is effected under this section, the grant, if it does not provide otherwise, continues in effect for the remainder of the extended renewal term.

[No parallel provision.]

(D) Termination of a grant under this subsection shall affect only those rights covered by the grant that arise under this title and shall in no way affect rights arising under any other Federal, State, or foreign laws.

(E) Unless and until termination is effected under this subsection, the grant, if it does not provide otherwise, continues in effect for the remainder of the extended renewal term.

§ 305. Duration of copyright: Terminal date

All terms of copyright provided by sections 302 through 304 run to the end of the calendar year in which they would otherwise expire.

§ 401. Notice of copyright: Visually perceptible copies

(a) **GENERAL REQUIREMENT.**—Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section shall be placed on all publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device.

(b) **FORM OF NOTICE.**—The notice appearing on the copies shall consist of the following three elements:

- (1) the symbol © (the letter C in a circle), the word "Copyright," or the abbreviation "Copr.,"
- (2) the year of first publication of the work; in the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient;
- (3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.

§ 10. PUBLICATION OF WORK WITH NOTICE.—Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking an interim protection under section 22 of this title.

§ 19. NOTICE: FORM.—The notice of copyright required by section 10 of this title shall consist either of the word "Copyright," the abbreviation "Copr.," or the symbol ©, accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication. In the case, however, of copies of works specified in subsections (f) to (k), inclusive, of section 5 of this title, the notice may consist of the letter C enclosed within a circle, thus ©, accompanied by the initials, monogram, mark, or symbol of the copyright proprietor: *Provided*, That on some accessible portion of such copies or of the margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted, his name shall appear. But in the case of works in which copyright was subsisting on July 1, 1909, the notice of copyright may be either in one of the forms prescribed herein or may consist of the following words: "Entered according to Act of Congress, in the year _____, by _____, in the office of the Librarian of

§ 401. Notice of copyright: Visually perceptible copies

(a) **GENERAL REQUIREMENT.**—Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section shall be placed on all publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device.

(b) **FORM OF NOTICE.**—The notice appearing on the copies shall consist of the following three elements:

- (1) the symbol © (the letter C in a circle), the word "Copyright," or the abbreviation "Copr.,"
- (2) the year of first publication of the work; in the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient;
- (3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.

Congress, at Washington, D.C., or, at his option, the word "Copyright", together with the year the copyright was entered and the name of the party by whom it was taken out; thus, "Copyright, 19—, by A. B."

(c) POSITION OF NOTICE.—The notice shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright. The Register of Copyrights shall prescribe by regulation, as examples, specific methods of affixation and positions of the notice on various types of works that will satisfy this requirement, but these specifications shall not be considered exhaustive.

§ 402. Notice of copyright: Phonorecords of sound recordings

(a) GENERAL REQUIREMENT.—Whenever a sound recording protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section shall be placed on all publicly distributed phonorecords of the sound recording.

(b) FORM OF NOTICE.—The notice appearing on the phonorecords shall consist of the following three elements:

- (1) the symbol © (the letter P in a circle);
- (2) the year of first publication of the sound recording;
- (3) the name of the owner of copyright in the sound recording, or an abbreviation by which the name can be

Congress, at Washington, D.C., or, at his option, the word "Copyright", together with the year the copyright was entered and the name of the party by whom it was taken out; thus, "Copyright, 19—, by A. B."

§ 20. SAME; PLACE OF APPLICATION OF; ONE NOTICE IN EACH VOLUME OR NUMBER OF NEWSPAPER OR PERIODICAL.—The notice of copyright shall be applied, in the case of a book or other printed publication, upon its title page or the page immediately following, or if a periodical either upon the title page or upon the first page of text of each separate number or under the title heading, or if a musical work either upon its title page or the first page of music. * * *

[No parallel provision.]

(c) POSITION OF NOTICE.—The notice shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright. The Register of Copyrights shall prescribe by regulation, as examples, specific methods of affixation and positions of the notice on various types of works that will satisfy this requirement, but these specifications shall not be considered exhaustive.

§ 402. Notice of copyright: Phonorecords of sound recordings

(a) Whenever a sound recording protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section shall be placed on all publicly distributed phonorecords of the sound recording.

(b) FORM OF NOTICE.—The notice appearing on the phonorecord shall consist of the following three elements:

- (1) the symbol © (the letter P in a circle);
- (2) the year of first publication of the sound recording;
- (3) the name of the owner of copyright in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alter-

recognized, or a generally known alternative designation of the owner; if the producer of the sound recording is named on the phonorecord labels or containers, and if no other name appears in conjunction with the notice, his name shall be considered a part of the notice.

(c) **POSITION OF NOTICE.**—The notice shall be placed on the surface of the phonorecord, or on the phonorecord label or container, in such manner and location as to give reasonable notice of the claim of copyright.

(d) **EFFECTIVE DATE OF REQUIREMENT.**—The requirements of this section apply to all phonorecords publicly distributed on or after January 1, 1969.

§ 403. Notice of copyright: Contributions to collective works

(a) A separate contribution to a collective work may bear its own notice of copyright, as provided by sections 401 and 402. However, a single notice applicable to the collective work as a whole is sufficient to satisfy the requirements of sections 401 and 402 with respect to the separate contributions it contains (not including advertisements inserted on behalf of persons other than the owner of copyright in the collective work), regardless of the ownership of copyright in the contributions and whether or not they have been previously published.

(b) Where the person named in a single notice applicable to a collective work as a whole is not the owner of copyright in a separate contribution that does not bear its own notice, the case is governed by the provisions of section 405(a).

native designation of the owner; if the producer of the sound recording is named on the phonorecord labels or containers, and if no other name appears in conjunction with the notice, his name shall be considered a part of the notice.

(c) **POSITION OF NOTICE.**—The notice shall be placed on the surface of the phonorecord, or on the phonorecord label or container, in such manner and location as to give reasonable notice of the claim of copyright.

(d) **EFFECTIVE DATE OF REQUIREMENT.**—The requirements of this section apply to all phonorecords publicly distributed on or after January 1, 1967.

§ 403. Notice of copyright: Contributions to collective works

(a) A separate contribution to a collective work may bear its own notice of copyright, as provided by sections 401 and 402. However, a single notice applicable to the collective work as a whole is sufficient to satisfy the requirements of sections 401 and 402 with respect to the separate contributions it contains (not including advertisements inserted on behalf of persons other than the owner of copyright in the collective work), regardless of the ownership of copyright in the contributions and whether or not they have been previously published.

(b) Where the person named in a single notice applicable to a collective work as a whole is not the owner of copyright in a separate contribution that does not bear its own notice, the case is governed by the provisions of section 405(a).

§ 20. * * * One notice of copyright in each volume or in each number of a newspaper or periodical published shall suffice.

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§ 404. Notice of copyright: Omission of notice

(a) **EFFECT OF OMISSION ON COPYRIGHT.**—The omission of the copyright notice prescribed by sections 401 and 402 from copies or phonorecords publicly distributed by authority of the copyright owner does not invalidate the copyright in a work if:

(1) the notice has been omitted from no more than a relatively small number of copies or phonorecords distributed to the public; or

(2) registration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered; or

(3) the notice has been omitted in violation of an express requirement in writing that, as a condition of the copyright owner's authorization of the public distribution of copies or phonorecords, they bear the prescribed notice.

(b) **EFFECT OF OMISSION ON INNOCENT INFRINGERS.**—Any person who innocently infringes a copyright, in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted, incurs no liability for actual or statutory damages under section 504 for any infringing acts committed before receiving actual notice that registration for the work had been made under section 407, if he proves that he was misled by the omission

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§ 21. SAME; EFFECT OF ACCIDENTAL OMISSION FROM COPY OR COPIES.—Where the copyright proprietor has sought to comply with the provisions of this title with respect to notice, the omission by accident or mistake of the prescribed notice from a particular copy or copies shall not invalidate the copyright or prevent recovery for infringement against any person who, after actual notice of the copyright, begins an undertaking to infringe it, but shall prevent the recovery of damages against an innocent infringer who has been misled by the omission of the notice; and in a suit for infringement no permanent injunction shall be had unless the copyright proprietor shall reimburse to the innocent infringer his reasonable outlay innocently incurred if the court, in its discretion, shall so direct.

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§ 404. Notice of copyright: Omission of notice

(a) **EFFECT OF OMISSION ON COPYRIGHT.**—The omission of the copyright notice prescribed by sections 401 and 402 from copies or phonorecords publicly distributed by authority of the copyright owner does not invalidate the copyright in a work if:

(1) the notice has been omitted from no more than a relatively small number of copies or phonorecords distributed to the public; or

(2) registration for the work under section 407 has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered.

(b) **EFFECT OF OMISSION ON INNOCENT INFRINGERS.**—Any person who innocently begins an undertaking that infringes a copyright incurs no liability for damages or profits under section 504 if he proves that he was misled by the omission of notice and if he undertook the infringement before receiving actual notice that registration for the work had been made under section 407. In a suit for infringement in such a case the court may require,

of notice. In a suit for infringement in such a case the court may allow or disallow recovery of any of the infringer's profits attributable to the infringement, and may enjoin the continuation of the infringing undertaking or may require, as a condition for permitting the infringer to continue his undertaking, that he pay the copyright owner a reasonable license fee in an amount and on terms fixed by the court.

(c) **REMOVAL OF NOTICE.**—Protection under this title is not affected by the removal, destruction, or obliteration of the notice, without the authorization of the copyright owner, from any publicly distributed copies or phonorecords.

§ 405. Notice of copyright: Error in name or date

(a) **ERROR IN NAME.**—Where the person named in the copyright notice on copies or phonorecords publicly distributed by authority of the copyright owner is not the owner of copyright, the validity and ownership of the copyright are not affected. In such a case, however, any person who innocently begins an undertaking that infringes the copyright has a complete defense to any action for such infringement if he proves that he was misled by the notice and began the undertaking in good faith under a purported transfer or license from the person named therein, unless before the undertaking was begun:

- (1) registration for the work had been made in the name of the owner of copyright; or
- (2) a document executed by the person named in the notice and showing the

as a condition for enjoining the completion of the undertaking, that the infringer be reimbursed for any reasonable expenditure incurred by him, and the court may require, as a condition for permitting the infringer to complete his undertaking, that he pay the copyright owner a reasonable license fee in an amount and on terms fixed by the court.

(c) **REMOVAL OF NOTICE.**—Protection under this title is not affected by the removal, destruction, or obliteration of the notice, without the authorization of the copyright owner, from any publicly distributed copies or phonorecords.

§ 405. Notice of copyright: Error in name or date

(a) **ERROR IN NAME.**—Where the person named in the copyright notice on copies or phonorecords publicly distributed by authority of the copyright owner is not the owner of copyright, the validity and ownership of the copyright are not affected. In such a case, however, any person who innocently begins an undertaking that infringes the copyright has a complete defense to any action for such infringement if he proves that he was misled by the notice and began the undertaking in good faith under a purported transfer or license from the person named therein, unless before the undertaking was begun:

- (1) registration for the work under section 407 had been made in the name of the owner of copyright; or
- (2) a document executed by the person named in the notice and showing the

§ 32. SAME; USE OF NAME OF ASSIGNEE IN NOTICE.—When an assignment of the copyright in a specified book or other work has been recorded the assignee may substitute his name for that of the assignor in the statutory notice of copyright prescribed by this title.

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ownership of the copyright had been recorded.

The person named in the notice is liable to account to the copyright owner for all receipts from purported transfers or licenses made by him under the copyright.

(b) ERROR IN DATE.—When the year date in the notice on copies or phonorecords distributed by authority of the copyright owner is earlier than the year in which publication first occurred, any period computed from the year of first publication under section 302 is to be computed from the year in the notice. Where the year date is more than one year later than the year in which publication first occurred, the work is considered to have been published without any notice and is governed by the provisions of section 404.

(c) OMISSION OF NAME OR DATE.—Where copies or phonorecords publicly distributed by authority of the copyright owner contain no name or no date that could reasonably be considered a part of the notice, the work is considered to have been published without any notice and is governed by the provisions of section 404.

§ 406. Deposit of copies or phonorecords for Library of Congress

(a) Except as provided by subsection (c), the owner of copyright or of the exclusive right of publication in a work published with notice of copyright in the United States shall deposit, within three months after the date of such publication:

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ownership of the copyright had been recorded as provided by section 205.

The person named in the notice is liable to account to the copyright owner for all receipts from purported transfers or licenses made by him under the copyright.

(b) ERROR IN DATE.—When the year date in the notice on copies or phonorecords distributed by authority of the copyright owner is earlier than the year in which publication first occurred, any period computed from the year of first publication under section 302 is to be computed from the year in the notice. Where the year date is more than one year later than the year in which publication first occurred, the work is considered to have been published without any notice and is governed by the provisions of section 404.

(c) OMISSION OF NAME OR DATE.—Where copies or phonorecords publicly distributed by authority of the copyright owner contain no name or no date that could reasonably be considered a part of the notice, the work is considered to have been published without any notice and is governed by the provisions of section 404.

§ 406. Deposit of copies or phonorecords for Library of Congress

(a) Except as provided by subsection (c), the owner of copyright or of the exclusive right of publication in a work published with notice of copyright in the United States shall deposit, within three months after the date of such publication:

§ 13. DEPOSIT OF COPIES AFTER PUBLICATION; ACTION OR PROCEEDING FOR INFRINGEMENT.—After copyright has been secured by publication of the work with the notice of copyright as provided in section 10 of this title, there shall be promptly deposited in the Copyright Office or in the mail addressed to the Register of Copy-

(1) two complete copies of the best edition; or

(2) if the work is a sound recording, two complete phonorecords of the best edition, together with any printed or other visually-perceptible material published with such phonorecords.

This deposit is not a condition of copyright protection.

(b) The required copies or phonorecords shall be deposited in the Copyright Office for the use or disposition of the Library of Congress. The Register of Copyrights shall, when requested by the depositor and upon payment of the fee prescribed by section 708, issue a receipt for the deposit.

(c) The Register of Copyrights may by regulation exempt any categories of material from the deposit requirements of this section, or require deposit of only one copy or phonorecord with respect to any categories.

(d) At any time after publication of a work as provided by subsection (a), the Register of Copyrights may make written demand for the required deposit on any of the persons obligated to make the deposit under subsection (a). Unless deposit is made within three months after the demand is received, the person or persons on whom the demand was made are liable:

(1) to a fine of not more than \$250 for each work; and

(2) to pay to the Library of Congress the total retail price of the copies or phonorecords demanded, or, if no retail price has been fixed, the reasonable cost

rights, Washington, District of Columbia, two complete copies of the best edition thereof then published, or if the work is by an author who is a citizen or subject of a foreign state or nation and has been published in a foreign country, one complete copy of the best edition then published in such foreign country, which copies or copy, if the work be a book or periodical, shall have been produced in accordance with the manufacturing provisions specified in section 16 of this title; or if such work be a contribution to a periodical, for which contribution special registration is requested, one copy of the issue or issues containing such contribution; or if the work belongs to a class specified in subsections (g), (h), (i) or (k) of section 5 of this title, and if the Register of Copyrights determines that it is impracticable to deposit copies because of their size, weight, fragility, or monetary value he may permit the deposit of photographs or other identifying reproductions in lieu of copies of the work as published under such rules and regulations as he may prescribe with the approval of the Librarian of Congress; or if the work is not reproduced in copies for sale there shall be deposited the copy, print, photograph, or other identifying reproduction provided by section 12 of this title, such copies to be accompanied by another reproduction to be examined in each case by a claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with

(1) two complete copies of the best edition; or

(2) if the work is a sound recording, two complete phonorecords of the best edition, together with any printed or other visually-perceptible material published with such phonorecords.

This deposit is not a condition of copyright protection.

(b) The required copies or phonorecords shall be deposited in the Copyright Office for the use or disposition of the Library of Congress. The Register of Copyrights shall, when requested by the depositor and upon payment of the fee prescribed by section 708, issue a receipt for the deposit.

(c) The Register of Copyrights may by regulation exempt any categories of material from the deposit requirements of this section, or require deposit of only one copy or phonorecord with respect to any categories.

(d) At any time after publication of a work as provided by subsection (a), the Register of Copyrights may make written demand for the required deposit on any of the persons obligated to make the deposit under subsection (a). Unless deposit is made within three months after the demand is received, the person or persons on whom the demand was made are liable:

(1) to a fine of not more than \$250 for each work; and

(2) to pay to the Library of Congress the total retail price of the copies or phonorecords demanded, or, if no retail price has been fixed, the reasonable cost

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to the Library of Congress of acquiring
them.

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respect to the deposit of copies and registration of such work shall have been compiled with.

§ 14. SAME; FAILURE TO DEPOSIT; DEMAND; PENALTY.—Should the copies called for by section 13 of this title not be promptly deposited as provided in this title, the Register of Copyrights may at any time after the publication of the work, upon actual notice, require the proprietor of the copyright to deposit them, and after the said demand shall have been made, in default of the deposit of copies of the work within three months from any part of the United States, except an outlying territorial possession of the United States, or within six months from any outlying territorial possession of the United States, or from any foreign country, the proprietor of the copyright shall be liable to a fine of \$100 and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void.

§ 407. Copyright registration in general

(a) REGISTRATION PERMISSIVE.—At any time during the subsistence of copyright in any published or unpublished work, the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 408 and 708. Subject to the provisions of section 404(a), such registration is not a condition of copyright protection.

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to the Library of Congress of acquiring
them.

§ 407. Copyright registration in general

(a) REGISTRATION PERMISSIVE.—At any time during the subsistence of copyright in any published or unpublished work, the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 408 and 708. Subject to the provisions of section 404(a), such registration is not a condition of copyright protection.

§ 11. REGISTRATION OF CLAIM AND ISSUANCE OF CERTIFICATE.—Such person may obtain registration of his claim to copyright by complying with the provisions of this title, including the deposit of copies and upon such compliance the Register of Copyrights shall issue to him the certificates provided for in section 209 of this title.

§ 6. REGISTRATION OF PRINTS AND LABELS.—Commencing July 1, 1940, the Register of Copyrights is charged with the registration of claims to copyright properly

(b) DEPOSIT FOR COPYRIGHT REGISTRATION.—Except as provided by subsection (c), the material deposited for registration shall include:

- (1) in the case of an unpublished work, one complete copy or phonorecord;
- (2) in the case of a published work, two complete copies or phonorecords of the best edition;
- (3) in the case of a work first published abroad, one complete copy or phonorecord as so published;
- (4) in the case of a contribution to a collective work, one complete copy or phonorecord of the best edition of the collective work.

Copies or phonorecords deposited for the Library of Congress under section 406 may be used to satisfy the deposit provisions of this section, if they are accompanied by the prescribed application and fee, and by any additional identifying material that the Register may, by regulation, require.

presented, in all prints and labels published in connection with the sale or advertisement of articles of merchandise, including all claims to copyright; in prints and labels pending in the Patent Office and uncleared at the close of business June 30, 1940. There shall be paid for registering a claim of copyright in any such print or label not a trade-mark \$6, which sum shall cover the expense of furnishing a certificate of such registration, under the seal of the Copyright Office, to the claimant of copyright.

§ 12. WORKS NOT REPRODUCED FOR SALE.—Copyright may also be had of the works of an author, of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or dramatico-musical composition; of a title and description, with one print taken from each scene or act, if the work be a motion-picture photoplay; of a photographic print if the work be a photograph; of a title and description, with not less than two prints taken from different sections of a complete motion picture, if the work be a motion picture other than a photoplay; or of a photograph or other identifying reproduction thereof, if it be a work of art or a plastic work or drawing. But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies, under sections 13 and 14 of this title, where the work is later reproduced in copies for sale.

[§ 13 *supra*.]
[§ 5 *supra*.]

(c) Except as provided by subsection (b), the material deposited for registration shall include:

- (1) in the case of an unpublished work, one complete copy or phonorecord;
- (2) in the case of a published work, two complete copies or phonorecords of the best edition;
- (3) in the case of a work first published abroad, one complete copy of phonorecord as so published;
- (4) in the case of a contribution to a collective work, one complete copy or phonorecord of the best edition of the collective work.

Copies or phonorecords deposited for the Library of Congress under section 406 may be used to satisfy the deposit provisions of this section, if they are accompanied by the prescribed application and fee, and by any additional identifying material that the Register may, by regulation, require.

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(c) ADMINISTRATIVE CLASSIFICATION AND OPTIONAL DEPOSIT.—The Register of Copyrights is authorized to specify by regulation the administrative classes into which works are to be placed for purposes of deposit and registration, and the nature of the copies or phonorecords to be deposited in the various classes specified. The regulations may require or permit, for particular classes, the deposit of identifying material instead of copies or phonorecords, the deposit of only one copy or phonorecord where two would normally be required, or a single registration for a group of related works. This administrative classification of works has no significance with respect to the subject matter of copyright or the exclusive rights provided by this title.

(d) CORRECTIONS AND AMPLIFICATIONS.—The Register may also establish, by regulation, formal procedures for the filing of an application for supplementary registration, to correct an error in a copyright registration or to amplify the information given in a registration. Such application shall be accompanied by the fee provided by section 708, and shall clearly identify the registration to be corrected or amplified. The information contained in a supplementary registration augments but does not supersede that contained in the earlier registration.

(e) PUBLISHED EDITION OF PREVIOUSLY REGISTERED WORK.—Registration for the first published edition of a work previously registered in unpublished form may be made even though the work as published is substantially the same as the unpublished version.

PROVISIONS OF THE 1965 BILL

(c) ADMINISTRATIVE CLASSIFICATION AND OPTIONAL DEPOSIT.—The Register of Copyrights is authorized to specify by regulation the administrative classes into which works are to be placed for purposes of deposit and registration, and the nature of the copies or phonorecords to be deposited in the various classes specified. The regulations may require or permit, for particular classes, the deposit of identifying material instead of copies or phonorecords, the deposit of only one copy or phonorecord where two would normally be required, or a single registration for a group of related works. This administrative classification of works has no significance with respect to the subject matter of copyright or the exclusive rights provided by this title.

(d) CORRECTIONS AND AMPLIFICATIONS.—The Register may also establish, by regulation, formal procedures for the filing of an application for supplementary registration, to correct an error in a copyright registration or to amplify the information given in a registration. Such application shall be accompanied by the fee provided by section 708, and shall clearly identify the registration to be corrected or amplified. The information contained in a supplementary registration augments but does not supersede that contained in the earlier registration.

(e) PUBLISHED EDITION OF PREVIOUSLY REGISTERED WORK.—Registration for the first published edition of a work previously registered in unpublished form may be made even though the work as published is substantially the same as the unpublished version.

§ 408. Application for registration

The application for copyright registration shall be made on a form prescribed by the Register of Copyrights and shall include:

- (1) the name and address of the copyright claimant;
- (2) in the case of a work other than an anonymous or pseudonymous work the name and nationality or domicile of the author or authors and, if one or more of the authors is dead, the dates of their deaths;
- (3) if the work is anonymous or pseudonymous, the nationality or domicile of the author or authors;
- (4) in the case of a work made for hire, a statement to this effect;
- (5) if the copyright claimant is not the author, a brief statement of how the claimant obtained ownership of the copyright;
- (6) the title of the work, together with any previous or alternative titles under which the work can be identified;

§ 209. CERTIFICATE OF REGISTRATION; EFFECT AS EVIDENCE; RECEIPT FOR COPIES DEPOSITED.

--In the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate of registration under seal of the copyright office, to contain the name and address of said claimant, the name of the country of which the author of the work is a citizen or subject, and when an alien author domiciled in the United States at the time of said registration, then a statement of that fact, including his place of domicile, the name of the author (when the records of the copyright office shall show the same), the title of the work which is registered for which copyright is claimed, the date of the deposit of the copies of such work, the date of publication if the work has been reproduced in copies for sale, or publicly distributed, and such marks as to class designation and entry number as shall fully identify the entry. In the case of a book, the certificate shall also state the receipt of the affidavit, as provided by section 17 of this title, and the date of the completion of the printing, or the date of the publication of the book, as stated in the said affidavit. The Register of Copyrights shall prepare a printed form for the said certificate, to be filled out in each case as above provided for in the case of all registrations made after July 1, 1909, and in the case of all previous registrations so far as the copyright office record books shall show such facts, which certificate, sealed with the seal of the copyright office, shall, upon payment of the prescribed fee, be given to any

§ 408. Application for registration

The application for copyright registration shall be made on a form prescribed by the Register of Copyrights and shall include:

- (1) the name and address of the copyright claimant;
- (2) in the case of a work other than an anonymous or pseudonymous work, the name and nationality or domicile of the author or authors and, if one or more of the authors is dead, the dates of their deaths;
- (3) if the work is anonymous or pseudonymous, the nationality or domicile of the author or authors;
- (4) in the case of a work made for hire, a statement to this effect;
- (5) if the copyright claimant is not the author, a brief statement of how the claimant obtained ownership of the copyright;
- (6) the title of the work, together with any previous or alternative titles under which the work can be identified;

PROVISIONS OF THE BILL AS REPORTED

- (7) the year in which creation of the work was completed;
- (8) if the work has been published, the date and nation of its first publication;
- (9) in the case of a compilation or derivative work, an identification of any pre-existing work or works that it is based on or incorporates, and a brief, general statement of the additional material covered by the copyright claim being registered;
- (10) in the case of a published work containing material of which copies are required by section 601 to be manufactured in the United States, the names of the persons or organizations who performed the processes specified by subsection (c) of section 601 with respect to that material, and the places where those processes were performed; and
- (11) any other information regarded by the Register of Copyrights as bearing upon the preparation or identification of the work or the existence, ownership, or duration of the copyright.

§ 409. Registration of claim and issuance of certificate

(a) When, after examination, the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met, he shall register the claim

PROVISIONS OF EXISTING LAW for the person * * * making application for the same.

- (7) the year in which creation of the work was completed;
- (8) if the work has been published, the date and nation of its first publication;
- (9) in the case of a compilation or derivative work, an identification of any pre-existing work or works that it is based on or incorporates, and a brief, general statement of the additional material covered by the copyright claim being registered; and
- (10) any other information regarded by the Register of Copyrights as bearing upon the preparation or identification of the work or the existence, ownership, or duration of the copyright.

§ 11. REGISTRATION OF CLAIM AND ISSUANCE OF CERTIFICATE.—Such person may obtain registration of his claim to copyright by complying with the provisions of this title, including the deposit of copies, and upon such compliance the Register of Copyrights shall issue to him the certificates provided for in section 209 of this title.

§ 409. Registration of claim and issuance of certificate

(a) When, after examination, the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met, he shall register the

claim and issue to the applicant a certificate of registration under the seal of the Copyright Office. The certificate shall contain the information given in the application, together with the number and effective date of the registration.

(b) In any case in which the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason, he shall refuse registration and shall notify the applicant in writing of the reasons for his action.

(c) In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.

(d) The effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office.

§ 208. RECORD BOOKS IN COPYRIGHT OFFICE.—The Register of Copyrights shall provide and keep such record books in the copyright office as are required to carry out the provisions of this title, and whenever deposit has been made in the copyright office of a copy of any work under the provisions of this title he shall make entry thereof.

§ 209. CERTIFICATE OF REGISTRATION; EFFECT AS EVIDENCE; RECEIPT FOR COPIES DEPOSITED.—In the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate of registration under seal of the copyright office, to contain the name and address of said claimant, the name of the country of which the author of the work is a citizen or subject, and when an alien author domiciled in the United States at the time of said registration, then a statement of that fact, including his place of domicile, the name of the author (when the records of the copyright office shall show the same), the title of the work which is registered for which copyright is claimed, the date of the deposit of the copies of such work, the date of publication if the work has been reproduced in copies for sale, or publicly distributed, and such marks as to class designation and entry number as shall fully identify the entry. In the case of a book, the certificate shall also state the receipt of the affidavit, as provided by section 17 of this title, and the date of the completion of the printing, or the date of the publication of the book, as stated in the said affidavit. The Register of Copyrights shall prepare a printed form for the said

and issue to the applicant a certificate of registration under the seal of the Copyright Office. The certificate shall contain the information given in the application, together with the number and effective date of the registration.

(b) In any case in which the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason, he shall refuse registration and shall notify the applicant in writing of the reasons for his action.

(c) In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.

(d) The effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office.

certificate, to be filed out in each case as above provided for in the case of all registrations made after July 1, 1909, and in the case of all previous registrations so far as the copyright office record books shall show such facts, which certificate, sealed with the seal of the copyright office, shall, upon payment of the prescribed fee, be given to any person making application for the same. Said certificate shall be admitted in any court as prima facie evidence of the facts stated therein. In addition to such certificate the register of copyrights shall furnish, upon request, without additional fee, a receipt for the copies of the work deposited to complete the registration.

§ 13. * * * No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with.

§ 410. Registration as prerequisite to infringement suit

No action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his option, become a party to the action with respect to the issue of registrability of the copyright claim by entering his appearance within sixty days after such service, but his failure to do so shall not deprive the court of jurisdiction to determine that issue.

§ 410. Registration as prerequisite to infringement suit

No action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his option, become a party to the action with respect to the issue of registrability of the copyright claim by entering his appearance within sixty days after such service, but his failure to do so shall not deprive the court of jurisdiction to determine that issue.

[No parallel provision.]

§ 411. Registration as prerequisite to certain remedies for infringement

In any action under this title, no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for:

- (1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or
- (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after its first publication.

[No parallel provision.]

§ 501. Infringement of copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 116, or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of sections 205(d) and 410, to institute an action for any infringement of that particular right committed while he is the owner of it. The court may require him to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

§ 411. Registration as prerequisite to certain remedies for infringement

In any action under this title, no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for:

- (1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or
- (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after its first publication.

§ 501. Infringement of copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 114, or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of sections 205(d) and 410, to institute an action for any infringement of that particular right committed while he is the owner of it. The court may require him to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

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§ 502. Remedies for Infringement: Injunctions

(a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

(b) Any such injunction may be served anywhere in the United States on the person enjoined; it shall be operative throughout the United States and shall be enforceable, by proceedings in contempt or otherwise, by any United States court having jurisdiction of that person. The clerk of the court granting the injunction shall, when requested by any other court in which enforcement of the injunction is sought, transmit promptly to the other court a certified copy of all the papers in the case on file in his office.

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§ 101. INFRINGEMENT.—If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) INJUNCTION.—To an injunction restraining such infringement * * *

§ 112. INJUNCTIONS; SERVICE AND ENFORCEMENT.—Any court mentioned in section 1338 of Title 28 or judge thereof shall have power, upon complaint filed by any party aggrieved, to grant injunctions to prevent and restrain the violation of any right secured by this title, according to the course and principles of courts of equity, on such terms as said court or judge may deem reasonable. Any injunction that may be granted restraining and enjoining the doing of anything forbidden by this title may be served on the parties against whom such injunction may be granted anywhere in the United States, and shall be operative throughout the United States and be enforceable by proceedings in contempt or otherwise by any other court or judge possessing jurisdiction of the defendants.

§ 113. TRANSMISSION OF CERTIFIED COPIES OF PAPERS FOR ENFORCEMENT OF INJUNCTION BY OTHER COURT.—The clerk of the court, or judge granting the injunction, shall, when required so to do by the court hearing the application to enforce said injunction, transmit without delay to said court a certified copy of all the papers in said cause that are on file in his office.

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§ 502. Remedies for Infringement: Injunctions

(a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 404(b) of this title and of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

(b) Any such injunction may be served anywhere in the United States on the person enjoined; it shall be operative throughout the United States and shall be enforceable, by proceedings in contempt or otherwise, by any United States court having jurisdiction of that person. The clerk of the court granting the injunction shall, when requested by any other court in which enforcement of the injunction is sought, transmit promptly to the other court a certified copy of all the papers in the case on file in his office.

§ 503. Remedies for infringement: Impounding and disposition of infringing articles

(a) At any time while an action under this title is pending, the court may order the impounding, on such terms as it may deem reasonable, of all copies or phonorecords claimed to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

(b) As part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all copies or phonorecords found to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

504. Remedies for infringement: Damages and profits

(a) **IN GENERAL.**—Except as otherwise provided by this title, an infringer of copyright is liable for either:

- (1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or
- (2) statutory damages, as provided by subsection (c).

(b) **ACTUAL DAMAGES AND PROFITS.**—The copyright owner is entitled to recover the actual damages suffered by him as a result of the infringement, and any profits of the infringer that are attributable to the

§ 101. **INFRINGEMENT.**—If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

* * * * *

(c) **IMPOUNDING DURING ACTION.**—To deliver up on oath, to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all articles alleged to infringe a copyright;

(d) **DESTRUCTION OF INFRINGING COPIES AND PLATES.**—To deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies as the court may order.

§ 101. **INFRINGEMENT.**—If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person be liable:

* * * * *

(b) **DAMAGES AND PROFITS; AMOUNT; OTHER REMEDIES.**—To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he

§ 503. Remedies for infringement: Impounding and disposition of infringing articles

(a) At any time while an action under this title is pending, the court may order the impounding, on such terms as it may deem reasonable, of all copies or phonorecords claimed to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

(b) As part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all copies or phonorecords found to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

§ 504. Remedies for infringement: Damages and profits

(a) **IN GENERAL.**—Except as otherwise provided by this title, an infringer of copyright is liable for either:

- (1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or
- (2) statutory damages, as provided by subsection (c).

(b) **ACTUAL DAMAGES AND PROFITS.**—The copyright owner is entitled to recover the actual damages suffered by him as a result of the infringement, and any profits of the infringer that are attributable to the

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infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

(c) STATUTORY DAMAGES.—

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$250 or more than \$10,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$20,000. In a case where the in-

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claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in case of a newspaper reproduction of a copyrighted photograph, such damages shall not exceed the sum of \$200 nor be less than the sum of \$50, and in the case of the infringement of an undramatized or non-dramatic work by means of motion pictures, where the infringer shall show that he was not aware that he was infringing, and that such infringement could not have been reasonably foreseen, such damages shall not exceed the sum of \$100; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of \$5,000 nor be less than \$250, and such damages shall in no other case exceed the sum of \$5,000 nor be less than the sum of \$250, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law,

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infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

(c) STATUTORY DAMAGES.—

(1) Except as provided in clause (2) of this subsection, the copyright owner may elect to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$250 or more than \$10,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving that infringement was committed willfully after service upon the infringer of a written notice to desist, the court in its discretion may increase the award of statutory damages to a sum of not more than \$20,000. In a case where the in-

nor shall the limitation, as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.

First. In the case of a painting, statue, or sculpture, \$10 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Second. In the case of any work enumerated in section 5 of this title, except a painting, statue, or sculpture, \$1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Third. In the case of a lecture, sermon, or address, \$50 for every infringing delivery;

Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, \$100 for the first and \$50 for every subsequent infringing performance; in the case of other musical compositions, \$10 for every infringing performance * * *

§ 1(c) * * * The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of \$100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen * * *

fringer sustains the burden of proving, and the court finds, that he was not aware and had no reason to believe that his acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$100. In a case where an instructor in a nonprofit educational institution, who infringed by reproducing a copyrighted work in copies or phonorecords for use in the course of face-to-face teaching activities in a classroom or similar place normally devoted to instruction, sustains the burden of proving that he believed and had reasonable grounds for believing that the reproduction was a fair use under section 107, the court in its discretion may remit statutory damages in whole or in part.

fringer sustains the burden of proving that he was not aware and had no reason to believe that his acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$100.

PROVISIONS OF THE BILL AS REPORTED

§ 505. Remedies for infringement: Costs and attorney's fees

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

§ 506. Criminal offenses

(a) **CRIMINAL INFRINGEMENT.**—Any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be fined not more than \$2,500 or imprisoned not more than one year, or both, for the first such offense, and shall be fined not more than \$10,000 or imprisoned not more than three years, or both, for any subsequent offense.

(b) **FRAUDULENT COPYRIGHT NOTICE.**—Any person who, with fraudulent intent, places on any article a notice of copyright or words of the same purport that he knows to be false, or who, with fraudulent intent, publicly distributes or imports for public distribution any article bearing such notice or words that he knows to be false, shall be fined not more than \$2,500.

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§ 116. COSTS; ATTORNEY'S FEES.—In all actions, suits, or proceedings under this title except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs.

§ 104. WILLFUL INFRINGEMENT FOR PROFIT.—Any person who willfully and for profit shall infringe any copyright secured by this title, or who shall knowingly and willfully aid or abet such infringement, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding one year or by a fine of not less than \$100 nor more than \$1,000, or both, in the discretion of the court. * * *

§ 105. FRAUDULENT NOTICE OF COPYRIGHT, OR REMOVAL OR ALTERATION OF NOTICE.—Any person who, with fraudulent intent, shall insert or impress any notice of copyright required by this title, or words of the same purport, in or upon any uncopyrighted article, or with fraudulent intent shall remove or alter the copyright notice upon any article duly copyrighted shall be guilty of a misdemeanor, punishable by a fine of not less than \$100 and not more than \$1,000. Any person who shall knowingly issue or sell any article bearing a notice of United States copyright which has not been copyrighted in this country, or who shall knowingly import

PROVISIONS OF THE 1905 BILL

§ 505. Remedies for infringement: Costs and attorney's fees

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

§ 506. Criminal offenses

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(b) **FRAUDULENT COPYRIGHT NOTICE.**—Any person who, with fraudulent intent, places on any article a notice of copyright or words of the same purport that he knows to be false, or who, with fraudulent intent, publicly distributes or imports for public distribution any article bearing such notice or words that he knows to be false, shall be fined not more than \$2,500.

any article bearing such notice or words of the same purport, which has not been copyrighted in this country, shall be liable to a fine of \$100.

(c) **FRAUDULENT REMOVAL OF COPYRIGHT NOTICE.**—Any person who, with fraudulent intent, removes or alters any notice of copyright appearing on a copy of a copyrighted work shall be fined not more than \$2,500.

(d) **FALSE REPRESENTATION.**—Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 408, or in any written statement filed in connection with the application, shall be fined not more than \$2,500.

§ 507. Limitations on actions

(a) **CRIMINAL PROCEEDINGS.**—No criminal proceeding shall be maintained under the provisions of this title unless it is commenced within three years after the cause of action arose.

(b) **CIVIL ACTIONS.**—No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.

§ 508. Notification of filing and determination of actions

(a) Within one month after the filing of any action under this title, the clerks of the courts of the United States shall send written notification to the Register of Copyrights setting forth, as far as is shown by the papers filed in the court, the names and addresses of the parties and the title, author, and registration number of each work involved in the action. If any other

(c) **FRAUDULENT REMOVAL OF COPYRIGHT NOTICE.**—Any person who, with fraudulent intent, removes or alters any notice of copyright appearing on a copy of a copyrighted work shall be fined not more than \$2,500.

(d) **FALSE REPRESENTATION.**—Any person who knowingly makes a false representation of a material fact in the application for a copyright registration provided for by section 408, or in any written statement filed in connection with the application, shall be fined not more than \$2,500.

§ 507. Limitations on actions

(a) **CRIMINAL PROCEEDINGS.**—No criminal proceeding shall be maintained under the provisions of this title unless it is commenced within three years after the cause of action arose.

(b) **CIVIL ACTIONS.**—No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.

§ 508. Notification of filing and determination of actions

(a) Within one month after the filing of any action under this title, the clerks of the courts of the United States shall send written notification to the Register of Copyrights setting forth, as far as is shown by the papers filed in the court, the names and addresses of the parties and the title, author, and registration number of each work involved in the action. If any other

§ 115.— LIMITATIONS.—(a) CRIMINAL PROCEEDINGS.—No criminal proceedings shall be maintained under the provisions of this title unless the same is commenced within three years after the cause of action arose.

(b) **CIVIL ACTIONS.**—No civil action shall be maintained under the provisions of this title unless the same is commenced within three years after the claim accrued.

[No parallel provision.]

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copyrighted work is later included in the action by amendment, answer, or other pleading, the clerk shall also send a notification concerning it to the Register within one month after the pleading is filed.

(b) Within one month after any final order or judgment is issued in the case, the clerk of the court shall notify the Register of it, sending him a copy of the order or judgment together with the written opinion, if any, of the court.

(c) Upon receiving the notifications specified in this section, the Register shall make them a part of the public records of the Copyright Office.

§ 601. Manufacture, importation, and public distribution of certain copies

(a) Except as provided by subsection (b), the importation into or public distribution in the United States of copies of a work consisting preponderantly of non-dramatic literary material that is in the English language and is protected under this title is prohibited unless the portions consisting of such material have been manufactured in the United States.

(b) The provisions of subsection (a) do not apply:

(1) where, on the date when importation is sought or public distribution in the United States is made, the author of any substantial part of such material is neither a national nor a domiciliary of the United States or, if he is a national of the United States, has been domiciled outside of the United States for a con-

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copyrighted work is later included in the action by amendment, answer, or other pleading, the clerk shall also send a notification concerning it to the Register within one month after the pleading is filed.

(b) Within one month after any final order or judgment is issued in the case, the clerk of the court shall notify the Register of it, sending him a copy of the order or judgment together with the written opinion, if any, of the court.

(c) Upon receiving the notifications specified in this section, the Register shall make them a part of the public records of the Copyright Office.

§ 601. Manufacture, importation, and public distribution of certain copies

(a) Except as provided by subsection (b), the importation into or public distribution in the United States of copies of a work consisting preponderantly of non-dramatic literary material that is in the English language and is protected under this title is prohibited unless the portions consisting of such material have been manufactured in the United States.

(b) The provisions of subsection (a) do not apply:

(1) where, on the date when importation is sought or public distribution in the United States is made, the author of any substantial part of such material is neither a citizen nor a domiciliary of the United States;

§ 16. MECHANICAL WORK TO BE DONE IN UNITED STATES.—Of the printed book or periodical specified in section 5, subsections (a) and (b), of this title, except the original text of a book or periodical of foreign origin in a language or languages other than English, the text of all copies accorded protection under this title, except as below provided, shall be printed from type set within the limits of the United States, either by hand or by the aid of any kind of typesetting machine, or from plates made within the limits of the United States from type set therein, or, if the text be produced by lithographic process, or photoengraving process, then by a process wholly performed within the limits of the United States, and the printing of the text and binding of the said book shall be performed within the limits of the United States; which requirements shall extend also to the illustrations

tinuous period of at least one year immediately preceding that date;

within a book consisting of printed text and illustrations produced by lithographic process, or photoengraving process, and also to separate lithographs or photoengravings, except where in either case the subjects represented are located in a foreign country and illustrate a scientific work or reproduce a work of art: *Provided, however,* That said requirements shall not apply to works in raised characters for the use of the blind, or to books or periodicals of foreign origin in a language or languages other than English, or to works printed or produced in the United States by any other process than those above specified in this section, or to copies of books or periodicals, first published abroad in the English language, imported into the United States within five years after first publication in a foreign state or nation up to the number of fifteen hundred copies of each such book or periodical if said copies shall contain notice of copyright in accordance with sections 10, 19, and 20 of this title and if ad interim copyright in said work shall have been obtained pursuant to section 22 of this title prior to the importation into the United States of any copy except those permitted by the provisions of section 107 of this title: *Provided further,* That the provisions of this section shall not affect the right of importation under the provisions of section 107 of this title.

§ 17. AFFIDAVIT TO ACCOMPANY COPIES.—In the case of the book the copies so deposited shall be accompanied by an affidavit under the official seal of any officer authorized to administer oaths within the

(2) where the Bureau of Customs is presented with an import statement issued under the seal of the Copyright Office, in which case a total of no more than 2,000 copies of any one such work shall be allowed entry; the import statement shall be issued upon request to the copyright owner or to a person designated by him at the time of registration for the work under section 407 or at any time thereafter;

(3) where importation is sought under the authority or for the use, other than in schools, of the government of the United States or of any State or political subdivision of a State;

(4) where importation, for use and not for sale, is sought;

(A) by any person with respect to no more than one copy of any one work at any one time;

(2) where the Bureau of Customs is presented with an import statement issued under the seal of the Copyright Office, in which case a total of no more than 3,500 copies of any one such work shall be allowed entry; the import statement shall be issued upon request to the copyright owner or to a person designated by him at the time of registration for the work under section 407 or at any time thereafter;

(3) where importation is sought under the authority or for the use, other than in schools, of the government of the United States or of any State;

(4) where importation, for use and not for sale, is sought;

(A) by any person with respect to no more than one copy of any one work at any one time;

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(B) by any person arriving from abroad, with respect to copies forming part of his personal baggage; or

(C) by an organization operated for scholarly, educational, or religious purposes and not for private gain, with respect to copies intended to form a part of its library;

(d) where the copies are reproduced in raised characters for the use of the blind;

(e) where, in addition to copies imported under clauses (3) and (4) of this subsection, no more than 2,000 copies of any one such work, which have not been manufactured in the United States, are publicly distributed in the United States.

(c) The requirement of this section that copies be manufactured in the United States is satisfied if:

(1) in the case where the copies are printed directly from type that has been set, or directly from plates made from such type, the setting of the type and the making of the plates have been performed in the United States; or

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United States, duly made by the person claiming copyright or by his duly authorized agent or representative residing in the United States, or by the printer who has printed the book, setting forth that the copies deposited have been printed from type set within the limits of the United States or from plates made within the limits of the United States from type set therein; or if the text be produced by lithographic process, or photoengraving process, that such process was wholly performed within the limits of the United States and that the printing of the text and binding of the said book have also been performed within the limits of the United States. Such affidavit shall state also the place where and the establishment or establishments in which such type was set or plates were made or lithographic process, or photoengraving process or printing and binding were performed and the date of the completion of the printing of the book or the date of publication.

§ 18. MAKING FALSE AFFIDAVIT.—Any person who, for the purpose of obtaining registration of a claim to copyright, shall knowingly make a false affidavit as to his having complied with the above conditions shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than \$1,000, and all of his rights and privileges under said copyright shall thereafter be forfeited.

§ 22. AD INTERIM PROTECTION OF BOOK OR PERIODICAL PUBLISHED ABROAD.—In the case of a book or periodical first published abroad in the English language, the

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(B) by any person arriving from abroad, with respect to copies forming part of his personal baggage; or

(C) by an organization operated for scholarly, educational, or religious purposes and not for private gain, with respect to copies intended to form a part of its library;

(3) where the copies are reproduced in raised characters for the use of the blind;

(c) where, in addition to copies imported under clauses (3) and (4) of this subsection, no more than 3,500 copies of any one such work, which have not been manufactured in the United States, are publicly distributed in the United States.

(c) The requirement of this section that copies be manufactured in the United States is satisfied where they have been printed from type set in the United States, either by hand or by the aid of any typesetting machine, or from plates made in the United States from type set therein, or, if

the text has been produced by lithographic process, or photoengraving process, then by a process wholly performed in the United States, and where the printing of the text and binding of the copies have been performed in the United States. If the copies have been printed or produced by any process other than those specified in this subsection, the requirement is satisfied where every step in their reproductive manufacture took place in the United States.

(d) Importation or public distribution of copies in violation of this section does not invalidate protection for a work under this title. However, in any action for infringement of the exclusive rights to reproduce and distribute copies of the work, the infringer has a complete defense if:

deposit in the Copyright Office, not later than six months after its publication abroad, of one complete copy of the foreign edition, with a request for the reservation of the copyright and a statement of the name and nationality of the author and of the copyright proprietor and of the date of publication of the said book or periodical, shall secure to the author or proprietor an interim copyright therein, which shall have all the force and effect given to copyright by this title, and shall endure until the expiration of five years after the date of first publication abroad.

§ 23. SAME; EXTENSION TO FULL TERM.—Whenever within the period of such ad interim protection an authorized edition of such books or periodicals shall be published within the United States, in accordance with the manufacturing provisions specified in section 16 of this title, and whenever the provisions of this title as to deposit of copies, registration, filing of affidavits, and the printing of the copyright notice shall have been duly complied with, the copyright shall be extended to endure in such book or periodical for the term provided in this title.

§ 107. IMPORTATION, DURING EXISTENCE OF COPYRIGHT, OF PIRATICAL COPIES, OR OF COPIES NOT PRODUCED IN ACCORDANCE WITH SECTION 16 OF THIS TITLE.—During the existence of the American copyright in any book the importation into the United States of any piratical copies thereof or of any copies thereof (although authorized by the author or proprietor) which have not been produced in accordance with the manufacturing provisions specified in

(2) in the case where the copies are printed directly from plates made by a lithographic or photoengraving process, the making of the plates has been performed in the United States; and

(3) in any case, the printing or other final process of producing multiple copies and any binding of the copies have been performed in the United States.

(d) Importation or public distribution of copies in violation of this section does not invalidate protection for a work under this title. However, in any civil action or criminal proceeding for infringement of the exclusive rights to reproduce and distribute copies of the work, the infringer has a complete defense with respect to all of the nondramatic literary material comprised in the work and any other parts of the work in which the exclusive rights to reproduce and distribute copies are owned by the same person who owns such exclusive rights in the nondramatic literary material, if he proves.

section 16 of this title, or any plates of the same not made from type set within the limits of the United States, or any copies thereof produced by lithographic or photo-engraving process not performed within the limits of the United States, in accordance with the provisions of section 16 of this title, is prohibited: *Provided, however*, That, except as regards piratical copies, such prohibition shall not apply:

(a) To works in raised characters for the use of the blind.

(b) To a foreign newspaper or magazine, although containing matter copyrighted in the United States printed or reprinted by authority of the copyright proprietor, unless such newspaper or magazine contains such newspaper or magazine contains also copyright matter printed or reprinted without such authorization.

(c) To the authorized edition of a book in a foreign language or languages of which only a translation into English has been copyrighted in this country.

(d) To any book published abroad with the authorization of the author or copyright proprietor when imported under the circumstances stated in one of the four subdivisions following, that is to say:

First. When imported, not more than one copy at one time, for individual use and not for sale; but such privilege of importation shall not extend to a foreign reprint of a book by an American author copyrighted in the United States.

Second. When imported by the authority or for the use of the United States.

(1) that copies of the work have been imported into or publicly distributed in the United States in violation of this section by or with the authority of the owner of such exclusive rights; and

(2) that the infringing copies were manufactured in the United States in accordance with the provisions of subsection (c); and

(3) that the infringement was commenced before the effective date of registration for an authorized edition of the work, the copies of which have been manufactured in the United States in accordance with the provisions of subsection (c).

(e) In any action for infringement of the

(1) he proves that copies of the work have been imported into or publicly distributed in the United States in violation of this section, and that the infringing copies were manufactured in the United States; and

(2) the owner of such exclusive rights then fails to sustain the burden of proving either:

(A) that such importation or public distribution was without his authority or acquiescence; or

(B) that the infringement was commenced more than three months after the effective date of registration for an authorized edition of the work, the copies of which have been manufactured in the United States.

exclusive rights to reproduce and distribute copies of a work containing material required by this section to be manufactured in the United States, the copyright owner shall set forth in the complaint the names of the persons or organizations who performed the processes specified by subsection (c) with respect to that material, and the places where those processes were performed.

Third. When imported, for use and not for sale, not more than one copy of any such book in any one invoice, in good faith by or for any society or institution incorporated for educational, literary, philosophical, scientific, or religious purposes, or for the encouragement of the fine arts, or for any college, academy, school, or seminary of learning, or for any State, school, college, university, or free public library in the United States.

Fourth. When such books form parts of libraries or collections purchased en bloc for the use of societies, institutions, or libraries designated in the foregoing paragraph, or form parts of the libraries or personal baggage belonging to persons or families arriving from foreign countries and are not intended for sale: *Provided*, That copies imported as above may not lawfully be used in any way to violate the rights of the proprietor of the American copyright or annul or limit the copyright protection secured by this title, and such unlawful use shall be deemed an infringement of copyright.

§ 602. Infringing importation of copies or phonorecords

(a) Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired abroad is an infringement of the exclusive right to distribute copies or phonorecords under section 106, actionable under section 501. This subsection does not apply to:

(1) importation of copies or phonorecords under the authority or for the

§ 602. Infringing importation of copies or phonorecords

(a) Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work for the purpose of distribution to the public is an infringement of the exclusive right to distribute copies or phonorecords under section 106, actionable under section 501. This section does not apply to importation by an organization operated for scholarly, educational, or religious purposes and not for private gain,

§ 106. IMPORTATION OF ARTICLES BEARING FALSE NOTICE OR PIRATICAL COPIES OF COPYRIGHTED WORK.—The importation into the United States of any article bearing a false notice of copyright when there is no existing copyright thereon in the United States, or of any piratical copies of any work copyrighted in the United States, is prohibited.

§ 107. IMPORTATION, DURING EXISTENCE OF COPYRIGHT, OF PIRATICAL COPIES, OR OF COPIES NOT PRODUCED IN ACCORDANCE WITH SECTION 16 OF THIS TITLE.—

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During the existence of the American copyright in any book the importation into the United States of any piratical copies thereof * * * is prohibited * * *

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use, other than in schools, of the government of the United States or of any State or political subdivision of a State, but not including copies of any audiovisual work imported for purposes other than archival use;

(2) importation, for use and not for sale, by any person with respect to no more than one copy or phonorecord of any one work at any one time, or by any person arriving from abroad with respect to copies or phonorecords forming part of his personal baggage; or

(3) importation by or for an organization operated for scholarly, educational, or religious purposes and not for private gain, with respect to no more than one copy of an audiovisual work solely for its archival purposes, and no more than five copies or phonorecords of any other work for its library lending or archival purposes.

(b) In a case where the making of the copies or phonorecords would have constituted an infringement of copyright if this title had been applicable, their importation is prohibited. In a case where the copies or phonorecords were lawfully made, the Bureau of Customs has no authority to prevent their importation unless the provisions of section 601 are applicable. In either case, the Secretary of the Treasury is authorized to prescribe, *by regulation, a procedure under which* any person claiming an interest in the copyright in a particular work may, upon payment of a specified fee, be entitled to notification by the Bureau of the importa-

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with respect to copies or phonorecords intended to form a part of its library.

(b) In a case where the making of the copies or phonorecords would have constituted an infringement of copyright if this title had been applicable, their importation is prohibited. In a case where the copies or phonorecords were lawfully made, the Bureau of Customs has no authority to prevent their importation unless the provisions of section 601 are applicable. In either case, the Secretary of the Treasury is authorized to prescribe, by regulation, a procedure under which any person claiming an interest in the copyright in a particular work may, upon payment of a specified fee, be entitled to notification by the Bureau of the im-

tion of articles that appear to be copies or phonorecords of the work.

§ 603. Importation prohibitions: Enforcement and disposition of excluded articles

(a) The Secretary of the Treasury and the Postmaster General shall separately or jointly make regulations for the enforcement of the provisions of this title prohibiting importation.

(b) These regulations may require, as a condition for the exclusion of articles under section 602:

(1) that the person seeking exclusion obtain a court order enjoining importation of the articles; or

(2) that he furnish proof, of a specified nature and in accordance with prescribed procedures, that the copyright in which he claims an interest is valid and that the importation would violate the prohibition in section 602; he may also be required to post a surety bond for any injury that may result if the detention or exclusion of the articles proves to be unjustified.

(c) Articles imported in violation of the importation prohibitions of this title are subject to seizure and forfeiture in the same manner as property imported in violation of the customs revenue laws. Forfeited articles shall be destroyed as directed by the Secretary of the Treasury or the court, as the case may be; however, the articles may be returned to the country of export

portation of articles that appear to be copies or phonorecords of the work.

§ 603. Importation prohibitions: Enforcement and disposition of excluded articles

(a) The Secretary of the Treasury and the Postmaster General shall separately or jointly make regulations for the enforcement of the provisions of this title prohibiting importation.

(b) These regulations may require, as a condition for the exclusion of articles under section 602:

(1) that the person seeking exclusion obtain a court order enjoining importation of the articles; or

(2) that he furnish proof, of a specified nature and in accordance with prescribed procedures, that the copyright in which he claims an interest is valid and that the importation would violate the prohibition in section 602; he may also be required to post a surety bond for any injury that may result if the detention or exclusion of the articles proves to be unjustified.

(c) Articles imported in violation of the importation prohibitions of this title are subject to seizure and forfeiture in the same manner as property imported in violation of the customs revenue laws. Forfeited articles shall be destroyed as directed by the Secretary of the Treasury or the court, as the case may be; however, the articles may be returned to the country of export

§ 109. IMPORTATION OF PROHIBITED ARTICLES; REGULATIONS; PROOF OF DEPOSIT OF COPIES BY COMPLAINANTS.—The Secretary of the Treasury and the Postmaster General are hereby empowered and required to make and enforce individually or jointly such rules and regulations as shall prevent the importation into the United States of articles prohibited importation by this title, and may require, as conditions precedent to exclusion of any work in which copyright is claimed, the copyright proprietor or any person claiming actual or potential injury by reason of actual or contemplated importations of copies of such work to file with the Post Office Department or the Treasury Department a certificate of the Register of Copyrights that the provisions of section 13 of this title have been fully complied with, and to give notice of such compliance to postmasters or to customs officers at the ports of entry in the United States in such form and accompanied by such exhibits as may be deemed necessary for the practical and efficient administration and enforcement of the provisions of sections 106 and 107 of this title.

§ 108. FORFEITURE AND DESTRUCTION OF ARTICLES PROHIBITED IMPORTATION.—Any and all articles prohibited importation by this title which are brought into the United States from any foreign country (except in the mails) shall be seized and forfeited by like proceedings as those provided by law for the seizure and condemnation of property imported into the United

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whenever it is shown to the satisfaction of the Secretary of the Treasury that the importer had no reasonable grounds for believing that his acts constituted a violation of law.

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States in violation of the customs revenue laws. Such articles when forfeited shall be destroyed in such manner as the Secretary of the Treasury or the court, as the case may be, shall direct: *Provided, however*, That all copies of authorized editions of copyright books imported in the mails or otherwise in violation of the provisions of this title may be exported and returned to the country of export whenever it is shown to the satisfaction of the Secretary of the Treasury, in a written application, that such importation does not involve willful negligence or fraud.

§ 701. The Copyright Office: General responsibilities and organization

(a) All administrative functions and duties under this title, except as otherwise specified, are the responsibility of the Register of Copyrights as director of the Copyright Office in the Library of Congress. The Register of Copyrights, together with the subordinate officers and employees of the Copyright Office, shall be appointed by the Librarian of Congress, and shall act under his general direction and supervision.

(b) The Register of Copyrights shall adopt a seal to be used on and after January 1, 1969, to authenticate all certified documents issued by the Copyright Office.

(c) The Register of Copyrights shall make an annual report to the Librarian of Congress of the work and accomplishments of the Copyright Office during the previous fiscal year. The annual report of the Register of Copyrights shall be published sep-

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whenever it is shown to the satisfaction of the Secretary of the Treasury that the importer had no reasonable grounds for believing that his acts constituted a violation of law.

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(b) The Register of Copyrights shall adopt a seal to be used on and after January 1, 1967 to authenticate all certified documents issued by the Copyright Office.

(c) The Register of Copyrights shall make an annual report to the Librarian of Congress of the work and accomplishments of the Copyright Office during the previous

arately and as a part of the annual report of the Librarian of Congress.

ordinate assistants to the register as may from time to time be authorized by law.

§ 203. SAME; DEPOSIT OF MONIES RECEIVED; REPORTS.—The Register of Copyrights shall make daily deposits in some bank in the District of Columbia, designated for this purpose by the Secretary of the Treasury as a national depository, of all moneys received to be applied as copyright fees, and shall make weekly deposits with the Secretary of the Treasury, in such manner as the latter shall direct, of all copyright fees actually applied under the provisions of this title, and annual deposits of sums received which it has not been possible to apply as copyright fees or to return to the remitters, and shall also make monthly reports to the Secretary of the Treasury and to the Librarian of Congress of the applied copyright fees for each calendar month, together with a statement of all remittances received, trust funds on hand, moneys refunded, and unapplied balances.

§ 204. SAME; BOND.—The Register of Copyrights shall give bond to the United States in the sum of \$20,000, in form to be approved by the General Counsel for the Department of the Treasury and with sureties satisfactory to the Secretary of the Treasury, for the faithful discharge of his duties.

§ 205. SAME; ANNUAL REPORT.—The Register of Copyrights shall make an annual report to the Librarian of Congress, to be printed in the annual report on the Library of Congress, of all copyright business for the previous fiscal year, including the number and kind of works

fiscal year. The annual report of the Register of Copyrights shall be published separately and as a part of the annual report of the Librarian of Congress.

§ 702. Copyright Office regulations

The Register of Copyrights is authorized to establish regulations not inconsistent with law for the administration of the functions and duties made his responsibility under this title. All regulations established by the Register under this title are subject to the approval of the Librarian of Congress.

§ 703. Effective date of actions in Copyright Office

In any case in which time limits are prescribed under this title for the performance of an action in the Copyright Office, and in which the last day of the prescribed period falls on a Saturday, Sunday, holiday or other non-business day within the District of Columbia or the Federal Government, the action may be taken on the next succeeding business day, and is effective as of the date when the period expired.

§ 704. Retention and disposition of articles deposited in Copyright Office

(a) Upon their deposit in the Copyright Office under sections 406 and 407, all copies, phonorecords, and identifying ma-

which have been deposited in the copyright office during the fiscal year, under the provisions of this title.

§ 206. SEAL OF COPYRIGHT OFFICE.—The seal used in the copyright office on July 1, 1909, shall be the seal of the copyright office, and by it all papers issued from the copyright office requiring authentication shall be authenticated.

§ 207. RULES FOR REGISTRATION OF CLAIMS.—Subject to the approval of the Librarian of Congress, the Register of Copyrights shall be authorized to make rules and regulations for the registration of claims to copyright as provided by this title.

§ 216. WHEN THE DAY FOR TAKING ACTION FALLS ON SATURDAY, SUNDAY, OR A HOLIDAY.—When the last day for making any deposit or application, or for paying any fee, or for delivering any other material to the Copyright Office falls on Saturday, Sunday, or a holiday within the District of Columbia, such action may be taken on the next succeeding business day.

§ 213. DISPOSITION OF ARTICLES DEPOSITED IN OFFICE.—Of the articles deposited in the copyright office under the provisions of the copyright laws of the United States, the Librarian of Congress

§ 702. Copyright Office regulations

The Register of Copyrights is authorized to establish regulations not inconsistent with law for the administration of the functions and duties made his responsibility under this title. All regulations established by the Register under this title are subject to the approval of the Librarian of Congress.

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In any case in which time limits are prescribed under this title for the performance of an action in the Copyright Office, and in which the last day of the prescribed period falls on a Saturday, Sunday, holiday or other non-business day within the District of Columbia or the Federal Government, the action may be taken on the next succeeding business day, and is effective as of the date when the period expired.

§ 704. Retention and disposition of articles deposited in Copyright Office

(a) Upon their deposit in the Copyright Office under sections 406 and 407, all copies, phonorecords, and identifying material,

material, including those deposited in connection with claims that have been refused registration, are the property of the United States Government.

(b) In the case of published works, all copies, phonorecords, and identifying material deposited are available to the Library of Congress for its collections, or for exchange or transfer to any other library. In the case of unpublished works, the Library is entitled to select any deposits for its collections.

(c) Deposits not selected by the Library under subsection (b), or identifying portions or reproductions of them, shall be retained under the control of the Copyright Office, including retention in Government storage facilities, for the longest period considered practicable and desirable by the Register of Copyrights and the Librarian of Congress. After that period it is within the joint discretion of the Register and the Librarian to order their destruction or other disposition; but, in the case of unpublished works, no deposit shall be destroyed or otherwise disposed of during its term of copyright.

(d) The depositor of copies, phonorecords, or identifying material under section 407, or the copyright owner of record, may request retention, under the control of the Copyright Office, of one or more of such articles for the full term of copyright in the work. The Register of Copyrights shall prescribe, by regulation, the condi-

shall determine what books and other articles shall be transferred to the permanent collections of the Library of Congress, including the law library, and what other books or articles shall be placed in the reserve collections of the Library of Congress for sale or exchange, or be transferred to other governmental libraries in the District of Columbia for use therein.

§ 214. DESTRUCTION OF ARTICLES DEPOSITED IN OFFICE REMAINING UNDISPOSED OF; REMOVAL OF BY AUTHOR OR PROPRIETOR; MANUSCRIPTS OF UNPUBLISHED WORKS.—Of any articles undisposed of as above provided, together with all titles and correspondence relating thereto, the Librarian of Congress and the Register of Copyrights jointly shall, at suitable intervals, determine what of these received during any period of years it is desirable or useful to preserve in the permanent files of the copyright office, and, after due notice as hereinafter provided, may within their discretion cause the remaining articles and other things to be destroyed: *Provided*, That there shall be printed in the Catalog of Copyright Entries from February to November, inclusive, a statement of the years of receipt of such articles and a notice to permit any author, copyright proprietor, or other lawful claimant to claim and remove before the expiration of the month of December of that year anything found which relates to any of his productions deposited or registered for copyright within the period of years stated, not reserved or

including those deposited in connection with claims that have been refused registration, are the property of the United States Government.

(b) In the case of published works, all copies, phonorecords, and identifying material deposited are available to the Library of Congress for its collections, or for exchange or transfer to any other library. In the case of unpublished works, the Library is entitled to select any deposits for its collections.

(c) Deposits not selected by the Library under subsection (b), or identifying portions or reproductions of them, shall be retained under the control of the Copyright Office, including retention in Government storage facilities, for the longest period considered practicable and desirable by the Register of Copyrights and the Librarian of Congress. After that period it is within the joint discretion of the Register and the Librarian to order their destruction or other disposition; but, in the case of unpublished works, no deposit shall be destroyed or otherwise disposed of during its term of copyright without specific notice to the copyright owner of record at his last address given in the public records of the Copyright Office, permitting him to claim and remove it.

(d) The depositor of copies, phonorecords, or identifying material under section 407, or the copyright owner of record, may request retention, under the control of the Copyright Office, of one or more of such articles for the full term of copyright in the work. The Register of Copyrights shall prescribe,

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tions under which such requests are to be made and granted, and shall fix the fee to be charged under section 708(11) if the request is granted.

§ 705. Copyright Office records: Preparation, maintenance, public inspection, and searching

(a) The Register of Copyrights shall provide and keep in the Copyright Office records of all deposits, registrations, recordings, and other actions taken under this title, and shall prepare indexes of all such records.

(b) Such records and indexes, as well as the articles deposited in connection with completed copyright registrations and retained under the control of the Copyright Office, shall be open to public inspection.

(c) Upon request and payment of the fee specified by section 708, the Copyright Office shall make a search of its public records, indexes, and deposits, and shall furnish a report of the information they disclose with respect to any particular deposits, registrations, or recorded documents.

§ 706. Copies of Copyright Office records

(a) Copies may be made of any public records or indexes of the Copyright Office; additional certificates of copyrights registrations and copies of any public records or indexes may be furnished upon request and payment of the fees specified by section 708.

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disposed of as provided for in this title. No manuscript of an unpublished work shall be destroyed during its term of copyright without specific notice to the copyright proprietor of record, permitting him to claim and remove it.

§ 208. RECORD BOOKS IN COPYRIGHT OFFICE.—The Register of Copyrights shall provide and keep such record books in the copyright office as are required to carry out the provisions of this title, and whenever deposit has been made in the copyright office of a copy of any work under the provisions of this title he shall make entry thereof.

§ 212. RECORDS AND WORKS DEPOSITED IN COPYRIGHT OFFICE OPEN TO PUBLIC INSPECTION; TAKING COPIES OF ENTRIES.—The record books of the copyright office, together with the indexes to such record books, and all works deposited and retained in the copyright office, shall be open to public inspection; and copies may be taken of the copyright entries actually made in such record books, subject to such safeguards and regulations as shall be prescribed by the Register of Copyrights and approved by the Librarian of Congress.

[§ 212 *Supra.*]

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by regulation, the conditions under which such requests are to be made and granted, and shall fix the fee to be charged under section 708(11) if the request is granted.

§ 705. Copyright Office records: Preparation, maintenance, public inspection, and searching

(a) The Register of Copyrights shall provide and keep in the Copyright Office records of all deposits, registrations, recordings, and other actions taken under this title, and shall prepare indexes of all such records.

(b) Such records and indexes, as well as the articles deposited in connection with completed copyright registrations and retained under the control of the Copyright Office, shall be open to public inspection.

(c) Upon request and payment of the fee specified by section 708, the Copyright Office shall make a search of its public records, indexes, and deposits, and shall furnish a report of the information they disclose with respect to any particular deposits, registrations, or recorded documents.

§ 706. Copies of Copyright Office records

(a) Copies may be made of any public records or indexes of the Copyright Office; additional certificates of copyright registration and copies of any public records or indexes may be furnished upon request and payment of the fees specified by section 708.

(b) Copies or reproductions of deposited articles retained under the control of the Copyright Office shall be authorized or furnished only under the conditions specified by the Copyright Office regulations.

§ 707. Copyright Office forms and publications

(a) CATALOG OF COPYRIGHT ENTRIES.—The Register of Copyrights shall compile and publish at periodic intervals catalogs of all copyright registrations. These catalogs shall be divided into parts in accordance with the various classes of works, and the Register has discretion to determine, on the basis of practicability and usefulness, the form and frequency of publication of each particular part.

(b) OTHER PUBLICATIONS.—The Register shall furnish, free of charge upon request, application forms for copyright registration and general informational material in connection with the functions of the Copyright Office. He also has authority to publish compilations of information, bibliographies, and other material he considers to be of value to the public.

(c) DISTRIBUTION OF PUBLICATIONS.—All publications of the Copyright Office shall be furnished to depository libraries as specified under section 2 of the Depository Library Act of 1962 (76 Stat. 353, 44 U.S.C. § 82), and, aside from those furnished free of charge, shall be offered for sale to the public at prices based on the cost of reproduction and distribution.

§ 210. CATALOG OF COPYRIGHT ENTRIES; EFFECT AS EVIDENCE.—The Register of Copyrights shall fully index all copyright registrations and assignments and shall print at periodic intervals a catalog of the titles of articles deposited and registered for copyright, together with suitable indexes, and at stated intervals shall print complete and indexed catalog for each class of copyright entries, and may thereupon, if expedient, destroy the original manuscript catalog cards containing the titles included in such printed volumes and representing the entries made during such intervals. The current catalog of copyright entries and the index volumes herein provided for shall be admitted in any court as prima facie evidence of the facts stated therein as regards any copyright registration.

§ 211. SAME; DISTRIBUTION AND SALE; DISPOSAL OF PROCEEDS.—The said printed current catalogs as they are issued shall be promptly distributed by the Superintendent of Documents to the collectors of customs of the United States and to the postmasters of all exchange offices of receipt of foreign mails, in accordance with revised list of such collectors of customs and postmasters prepared by the Secretary of the Treasury and the Postmaster General, and they shall also be

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furnished in whole or in part to all parties desiring them at a price to be determined by the Register of Copyrights for each part of the catalog not exceeding \$75 for the complete yearly catalog of copyright entries. The consolidated catalogs and indexes shall also be supplied to all persons ordering them at such prices as may be fixed by the Register of Copyrights, and all subscriptions for the catalogs shall be received by the Superintendent of Documents, who shall forward the said publications; and the moneys thus received shall be paid into the Treasury of the United States and accounted for under such laws and Treasury regulations as shall be in force at the time.

§ 708. Copyright Office fees.

(a) The following fees shall be paid to the Register of Copyrights:

(1) for the registration of a copyright claim or a supplementary registration under section 407, including the issuance of a certificate of registration, \$6;

(2) for the registration of a claim to renewal of a subsisting copyright in its first term under section 304(a), including the issuance of a certificate of registration, \$4;

(3) for the issuance of a receipt for a deposit under section 406, \$2;

(4) for the recordation, as provided by section 205, of a transfer of copyright ownership or other document of six pages or less, covering no more than one title,

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(2) for the registration of a claim to renewal of a subsisting copyright in its first term under section 304(a), including the issuance of a certificate of registration, \$4;

(3) for the issuance of a receipt for a deposit under section 406, \$2;

(4) for the recordation, as provided by section 205, of a transfer of copyright ownership or other document of six pages or less, covering no more than one title, \$5; for each page over

\$5; for each page over six and for each title over one, 50 cents additional;

(5) for the filing, under section 115(b), of a notice of intention to make phonorecords, \$3;

months from the date of first publication abroad deposit in the Copyright Office an application for registration and two copies of the work which shall be accompanied by a catalog card in form and content satisfactory to the Register of Copyrights.

For every additional certificate of registration, \$2.

For certifying a copy of an application for registration of copyright, and for all other certifications, \$3.

For recording every assignment, agreement, power of attorney or other paper not exceeding six pages, \$5; for each additional page or loss, 50 cents; for each title over one in the paper recorded, 50 cents additional.

For recording a notice of use, or notice of intention to use, \$3, for each notice of not more than five titles; and 50 cents for each additional title.

For any requested search of Copyright Office records, works deposited, or other available material, or services rendered in connection therewith, \$5, for each hour of time consumed.

(6) for the recordation, under section 302(c), of a statement revealing the identity of an author of an anonymous or pseudonymous work, or for the recordation, under section 302(d), of a statement relating to the death of an author, \$5 for a document of six pages or less, covering no more than one title; for each page over six and for each title over one, 50 cents additional;

(7) for the issuance, under section 601, of an import statement, \$3;

six and for each title over one, 50 cents additional;

(5) for the filing, under section 113(b), of a notice of intention to make phonorecords, \$3;

(6) for the recordation, under section 302(d), of a statement relating to the death of an author, \$5;

(7) for the issuance, under section 601, of an import statement, \$3;

(8) for the issuance under section 706, of an additional certificate of registration, \$2;

(9) for the issuance of any other certification, \$3; the Register of Copyrights has discretion, on the basis of their cost, to fix the fees for preparing copies of Copyright Office records,

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(8) for the issuance, under section 706, of an additional certificate of registration, \$2;

(9) for the issuance of any other certification, \$3; the Register of Copyrights has discretion, on the basis of their cost, to fix the fees for preparing copies of Copyright Office records, whether they are to be certified or not;

(10) for the making and reporting of a search as provided by section 705, and for any related services, \$5 for each hour or fraction of an hour consumed;

(11) for any other special services requiring a substantial amount of time or expense, such fees as the Register of Copyrights may fix on the basis of the cost of providing the service.

(b) The fees prescribed by or under this section are applicable to the United States Government and any of its agencies, employees, or officers, but the Register of Copyrights has discretion to waive the requirement of this subsection in occasional or isolated cases involving relatively small amounts.

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whether they are to be certified or not;

(10) for the making and reporting of a search as provided by section 705, and for any related services, \$5 for each hour or fraction of an hour consumed;

(11) for any other special services requiring a substantial amount of time or expense, such fees as the Register of Copyrights may fix on the basis of the cost of providing the service.

(b) The fees prescribed by or under this section are applicable to the United States Government and any of its agencies, employees, or officers, but the Register of Copyrights has discretion to waive the requirement of this subsection in occasional or isolated cases involving relatively small amounts.

(B) (OTHER CHANGES IN EXISTING LAW)**SECTION 52 OF THE PRINTING ACT, APPROVED JANUARY 12, 1895 (28 STAT. 608; 44 U.S.C. 58 (1964))**

SEC. 52. The Public Printer shall sell, under such regulations as the Joint Committee on Printing may prescribe, to any person or persons who may apply additional or duplicate stereotype or electrotype plates from which any Government publication is printed, at a price not to exceed the cost of composition, the metal and making to the Government and ten per centum added: *Provided*, That the full amount of the price shall be paid when the order is filed [: *And provided further*, That no publication reprinted from such stereotype or electrotype plates and no other Government publication shall be copyrighted].

SECTION 510 OF THE FEDERAL RECORDS ACT OF 1950 (64 STAT. 589, 44 U.S.C. 400 (1964))

SEC. 510. With respect to letters and other intellectual productions (exclusive of [material copyrighted or patented] *patented material, published works under copyright protection, and unpublished works for which copyright registration has been made*) after they come into the custody or possession of the Administrator, neither the United States nor its agents shall be liable for any infringement of [literary property rights] *copyright* or analogous rights arising thereafter out of use of such materials for display, inspection, research, reproduction or other purposes.

SECTION 1498 OF TITLE 28, UNITED STATES CODE**§ 1498. Patent and copyright cases.**

(a) * * *

(b) Hereafter, whenever the copyright in any work protected under the copyright laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government and with the authorization or consent of the Government, the exclusive remedy of the owner of such copyright shall be by action against the United States in the Court of Claims for the recovery of his reasonable and entire compensation as damages for such infringement, including the minimum statutory damages as set forth in [section 101(b) of title 17] *section 504(c) of title 17*, United States Code: *Provided*, That a Government employee shall have a right of action against the Government under this subsection except where he was in a position to order, influence, or induce use of the copyrighted work by the Government: *Provided, however*, That this subsection shall not confer a right of action on any copyright owner or any assignee of such owner with respect to any copyrighted work prepared by a person while in the employment or service of the United States, where the copyrighted work was prepared

as a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used: *And provided further*, That before such action against the United States has been instituted the appropriate corporation owned or controlled by the United States or the head of the appropriate department or agency of the Government, as the case may be, is authorized to enter into an agreement with the copyright owner in full settlement and compromise for the damages accruing to him by reason of such infringement and to settle the claim administratively out of available appropriations.

Except as otherwise provided by law, no recovery shall be had for any infringement of a copyright covered by this subsection committed more than three years prior to the filing of the complaint or counterclaim for infringement in the action, except that the period between the date of receipt of a written claim for compensation by the Department or agency of the Government or corporation owned or controlled by the United States, as the case may be, having authority to settle such claim and the date of mailing by the Government of a notice to the claimant that his claim has been denied shall not be counted as a part of the three years, unless suit is brought before the last-mentioned date.

(c) * * *

**SECTION 543(a)(4) OF THE INTERNAL REVENUE CODE
OF 1954, AS AMENDED (26 U.S.C. 543(a)(4))**

(4) COPYRIGHT ROYALTIES.—

* * * * *

(A) * * *

(B) * * *

(C) * * *

For purposes of this subsection, the term "copyright royalties" means compensation, however designated, for the use of, or the right to use, copyrights in works protected by copyright issued under title 17 of the United States Code [(other than by reason of section 2 or 6 thereof)] and to which copyright protection is also extended by the laws of any country other than the United States of America by virtue of any international treaty, convention, or agreement, or interests in any such copyrighted works, and includes payments from any person for performing rights in any such copyrighted work and payments (other than produced film rents as defined in paragraph (5)(B)) received for the use of, or right to use, films. For purposes of this paragraph, the term "shareholder" shall include any person who owns stock within the meaning of section 544.

SECTION 4152 OF TITLE 39 OF THE UNITED STATES CODE**§ 4152. Penalty mail.**

(a) Subject to the limitations imposed by sections 4154 and 4158 of this title, there may be transmitted as penalty mail—

(1) * * *

(2) * * *

(3) * * *

(4) * * *

[(5) articles for copyright deposited with postmasters and addressed to the Register of Copyrights pursuant to section 15 of title 17.]

(b) * * *

(c) * * *

MINORITY VIEWS OF HON. BYRON G. ROGERS AND HON.
BASIL L. WHITENER

This proposal should not be adopted because section 116 is totally impractical and unworkable; it imposes an oppressive and unjust burden on the operators of coin-operated phonographs; and it should be rejected in its present form because:

1. It requires every operator to maintain overwhelming quantities of bookkeeping records showing, phonograph by phonograph, for each calendar quarter year, the name of every musical composition and the name, and other indexes of ownership, of every copyright owner of every recorded composition that is made available for performance in every one of his phonographs. The majority report indicates that the average operator has between 60 and 75 jukeboxes, and that the average-size box holds 80 records, or a minimum 160 compositions,¹ with a combined capacity for all of his machines amounting to at least 9,600 to 12,000 compositions. The report also indicates that jukebox purchases average 115 records or 230 compositions per machine per year,² so that the average operator acquires from 3,450 to 4,312 new compositions each calendar quarter, or from 13,800 to 17,250 each year. Thus, the average operator must maintain inventory records for 13,050 to 16,312 compositions each calendar quarter, and from 52,200 to 65,250 such inventory records each year.

2. It requires every operator to prepare and send to copyright owners or their agents once every calendar quarter year listings of all the 13,050 to 16,312 compositions made available in his machines, on a phonograph-by-phonograph basis, and each listing must show the name of every composition and the name and other identification of every copyright owner.

3. It requires every operator to file with the Copyright Office, in January of each year, lists of all the compositions made available in each of his phonographs throughout the previous calendar year. Unlike the listings furnished quarterly to the copyright owners, the annual listings furnished to the Copyright Office must include all compositions, cumulated annually, phonograph by phonograph. Thus, for the average operator, the number of items listed for the Copyright Office, annually, would total from 23,400 to 29,250 titles and other indicia of ownership.

4. It requires every operator to register every one of his phonographs with the Copyright Office, within 1 month after he places it on location, showing the identifying serial number and capacity of the phonograph and the name and address of the establishment where each phonograph is located, as well as the name and address of the operator himself; and it further requires that he obtain from the Copyright Office, and affix to each particular machine, a certificate showing the fact of such registration. Any change in location of a phonograph, such as customary machine rotation, or replacement of a phonograph for repairs, or for any other reason, would require re-registration in the same manner. Furthermore, in January of each succeeding year, every operator must register and certificate every one of his phonographs in the same manner and his applications for registration must be accompanied by lists of the previous year's

¹ Under the caption "Amount of royalty" in the sectional analysis and discussion, above.

² *Ibid.*

musical compositions, which, as described in paragraph 3 above, would amount to a total of 23,400 to 29,250 items.

5. It establishes an oppressively high rate of royalty (3 cents per composition per quarter) which the majority report shows² would amount to at least \$9.2 million a year. These royalties would have to be paid in quarterly installments, accompanying the quarterly reports described in paragraph 2 above.

6. The fantastic volume of bookkeeping and reporting by the operators which would be necessary for them to comply with these requirements of section 116 is conservatively estimated as costing them at least as much again as the proposed royalty itself.

7. In addition to this new "jukebox" royalty, the operators will continue to bear the cost of statutory mechanical royalties under section 115, which are being raised in this bill from 2 to 2½ cents, maximum, per composition. Mechanical royalties derived from this industry will amount to more than \$2½ million per year.

8. Thus, the total musical copyright royalties from this industry, which is composed almost entirely of small businessmen throughout the United States, will amount to more than \$11.7 million per year, making the copyright burden upon this small industry greater than that of every other industry, except radio and television broadcasting.

9. The civil and criminal penalties which may be imposed upon the operators in this industry can amount to as much as \$20,000 or 3 years' imprisonment for a single infringement. Unlike some other users of copyrighted materials, no relief is provided for innocent infringement by a music operator.

10. No greater protection to any property right is afforded at any other place in the law as proposed in this bill. This bill has a statutory penalty of \$250, plus attorney fees, for each violation, and places the jukebox operator entirely at the mercy of all copyright owners of songs.

The owner of a copyright can dispose of the same as he sees fit at whatever price he may ask. However, to permit him to collect royalties after he has once sold the same creates a new legal right. It is like the inventor of a spark plug who sells it to a manufacturing company, and thereafter the manufacturing company installs it in the engine of a bus. The bus is then used to transport people for profit and under the theory of this bill, the patent owner would be entitled to collect certain sums for the use of the patent that had already been sold. This bill should be defeated.

BYRON G. ROGERS.
BASIL L. WHITENER.

²Lbld.

ADDITIONAL VIEWS OF HON. BASIL L. WHITENER

In addition to those views set forth heretofore with reference to the application of this bill to operators of coin-operated phonographs, I desire to interpose objection to the provisions of the legislation relating to community antenna television.

I have serious doubts as to the constitutionality of section 111, since it would seem to be in contravention of the first amendment to the Constitution. The proscription against free speech in a nonregulated industry seems to me to go beyond the permissible range of legislation.

There are other features of the CATV provisions in the bill which seem objectionable to me and give rise to appropriate amendment. Not having been a member of the subcommittee or having had the benefit of hearing all of the testimony, I shall require further study before I can detail some of these objections. This will be done prior to consideration of the bill in the House of Representatives.

In general, I feel that the legislation should be defeated unless there is substantial amendment both as to CATV and coin-operated phonograph establishments.

BASIL L. WHITENER.

